90-369

CASE NO. 90-____

Supreme Court, U.S.
FILED
AUG 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

HARLEY VOLLRATH,

Petitioner,

v.

GEORGIA PACIFIC CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDICES –

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QUESTION PRESENTED FOR REVIEW

WHETHER THE SIXTH CIRCUIT FAILED TO CORRECTLY APPLY THE *ERIE* DOCTRINE IN DECIDING A STATE LAW CLAIM OF WRONGFUL TERMINATION WHEN MICHIGAN LAW DICTATED REVERSAL OF THE DISTRICT COURT'S GRANT OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND THE SIXTH CIRCUIT AFFIRMED THE DISTRICT COURT'S DECISION?

LIST OF ALL PARTIES

All parties are listed in the caption of this case.

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STATUTE:

28 U.S.C. § 1254(1) 1

CASE NO. 90-____

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HARLEY VOLLRATH,

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v.

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CITATION TO OPINIONS BELOW

- *Vollrath* v. *Georgia-Pacific Corp.*, 899 F.2d 533 (6th Cir. 1990)
- *Vollrath* v. *Georgia-Pacific Corp.*, Civil Action No. K-87-226 (W.D. Mich. 1988)

STATEMENT OF JURISDICTIONAL GROUNDS

This Court's jurisdiction is based on 28 U.S.C. § 1254(1) to review a judgment of the United States Court of Appeals for the Sixth Circuit in *Vollrath* v. *Georgia-Pacific Corp.*, 899 F.2d 533 (6th Cir. 1990). The Sixth Circuit rendered its decision on March 30, 1990 (B-1). On April 16, 1990 Plaintiff-Petitioner made motion to extend time in which to file a motion for rehearing *en banc*. The Court granted the

motion on May 4, 1990. On May 31, 1990 the Court issued an order that provided:

> "The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing en banc has been referred to the original hearing panel.
>
> The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied." (A-1).

STATEMENT OF THE CASE

Harley Vollrath, Plaintiff-Petitioner, brought the present case alleging the Georgia-Pacific Corporation, Defendant-Respondent, had wrongfully discharged him. (*Vollrath* v. *Georgia-Pacific Corp.*, Civil Action No. K-87-226, R.1: Petition for Removal with Attachments). Georgia-Pacific removed the case to federal court because of diversity of citizenship and the amount in controversy. Georgia-Pacific asserted a number of affirmative defenses. (*Id.*, R.8: Answer by Defendant with Defenses).

The case was arbitrated and the arbitration award vacated by the District Court. (*Id.*, R.32: Order Vacating Judgment on Arbitration Award). Georgia-Pacific subsequently moved for summary judgment, claiming that Vollrath was an employee at-will and that it had good cause to terminate him. (*Id.*, R.39: Motion by

Defendant to Dismiss and/or for Summary Judgment; R.40: Memorandum by Defendant in Support of its Motion to Dismiss and/or for Summary Judgment). The Court granted Georgia-Pacific's Motion and issued a written opinion. (*Id.*, R.49: Opinion [*see also* C-1, *infra*]; R.50: Judgment in Accordance with Opinion). The United States Court of Appeals for the Sixth Circuit affirmed the District Court's decision. (B-1). *Vollrath* v. *Georgia-Pacific Corp.*, 899 F.2d 533 (6th Cir. 1990). Vollrath moved for rehearing *en banc*. Because no judge of the Sixth Circuit expressed an interest in the case, the motion for rehearing was forwarded to the panel that originally heard this case and denied the motion for rehearing. (A-1).

Vollrath has sought review of that adverse decision by this Court.

STATEMENT OF FACTS

In 1981, Harley Vollrath, Plaintiff-Petitioner, began employment with Georgia-Pacific Corporation, Defendant-Respondent. Georgia-Pacific hired Vollrath to fill the position of Area Maintenance Supervisor at a paper mill located in Kalamazoo, Michigan.

In 1983, Georgia-Pacific promoted Vollrath to the position of Plant Maintenance Supervisor at the Kalamazoo mill. During his tenure as Plant Maintenance Supervisor, the mill experienced some problems with a major piece of equipment. (Deposition of Harley Vollrath, at pp. 186, 187). As a result of the problems with that piece of machinery, the maintenance costs for the mill were substantial. The plant manager saw the problem as being Vollrath's performance as Plant Maintenance Supervisor rather than the problems with the machinery. Vollrath's performance reviews, however,

were always consistently high. (Deposition of David Norman, at pp. 39-34).[1]

In 1986, Georgia-Pacific offered Vollrath the position of Field Maintenance Representative in an attempt to remove him from the Plant Maintenance Supervisor position. Vollrath accepted the newly-created position of Field Maintenance Representative.

As a Field Maintenance Representative, Vollrath had the responsibility of handling maintenance problems at more than one mill owned by Georgia-Pacific. Vollrath continued to be based in Kalamazoo and on the Kalamazoo mill's payroll; however, the company charged Vollrath's salary and expenses to all of the mills assigned to Vollrath. (Deposition of David Norman at pp. 72-73). The major emphasis of the position was the Taylorsville, Indiana mill. The problems at the Taylorsville plant seemed unresolveable. Vollrath communicated his opinions concerning the Taylorsville plant's problems to Georgia-Pacific's management. He also indicated that the plant might close if the problems at the Taylorsville plant remained unresolved. (Deposition of Harley Vollrath, at pp. 104, 106).

Although Georgia-Pacific had allocated Vollrath's salary and expenses to several plants, it also contends that it became necessary to eliminate Vollrath's position from the Kalamazoo payroll to eliminate costs. (*See*, Brief in Support of Defendant's Motion to Dismiss

---

[1] "Q. . . . Would it be fair to say that your evaluations, which were performed of Mr. Vollrath on an annual basis, were consistently high?

A. Yes.

Q. Were those based on performance?

A. Yes."

(Deposition of David Norman, at p. 29).

and/or Summary Judgment, at p. 9). The Kalamazoo plant manager, David Norman, testified that the reasons for Vollrath's termination were not because of economic reasons. (Deposition of David Norman, at pp. 61-63).[2] Norman also testified that he made the decision to terminate Vollrath's employment because Vollrath would not go back to the Taylorsville plant; however, Norman's testimony is vague about what Vollrath actually told Norman. (Deposition of David Norman, at pp. 43-46, 64). Furthermore, the termination papers indicated that Vollrath was involuntarily terminated, not that the company eliminated the job. (Deposition of David Norman, at p. 49).

On April 7, 1986, merely three months after being offered the Field Maintenance Representative position, Sam Selders, the Kalamazoo plant's personnel manager, contends that he offered Vollrath two options — termination or transfer to the Taylorsville mill. According to the company, Vollrath refused the transfer to the Taylorsville mill. Vollrath, however, testified that Selders never offered him the job. (Deposition of Harley Vollrath, at pp. 104-106).

During the course of his tenure, David Norman represented to Vollrath, among others, that Vollrath would

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[2] "Q. . . . Let me ask you this: In terms of the elimination of this field representative position, it wasn't eliminated then for economic reasons or any other reason?

A. As long as Harley went to Taylorsville, his salary was charged to them.

* * *

Q. . . . I mean, but in terms of the elimination of the position, was it eliminated because Taylorsville didn't want to pay for Harley any longer?

A. No."

(Deposition of David Norman, at pp. 61-62).

continue to be employed so long as he continued to do his job. (*Id.*, at pp. 31, 109, 120-121, 122, 125).[3]

Vollrath testified during his deposition that Norman stated:

> "'If you are doing your job, you can't be fired. Simple as that.'"

(*Id.*, at p. 31; *See also, id.*, at pp. 36, 109, 113, 120-121, 122, 125-126, 135-136, 137, 145, 204, 241-242, 290-291).[4] Norman made the first such statement to Vollrath in the time period of 1981-1983. (Deposition of Harley Vollrath, at pp. 7-8, 241).[5] In fact, Norman made that

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[3] "Q. Mr. Norman never told you that you would only be discharged only for just cause, did he? He never used words like that did he?

A. All he said, 'If you do your job you can't be fired.'"

(Deposition of Harley Vollrath, at p. 125).

[4] "Q. Do you recall ever telling Harley that as long as he did his job, he wouldn't be fired?

A. I always said that the best way to keep your job is to do it."

(Deposition of David Norman, at p. 54).

[5] "Q. I want to clarify something yesterday. You said that Mr. Norman had made oral statements to you about job security?

A. Yes.

Q. You can't recall verbatim what he said?

A. It was a well-known statement, because he made it to a lot of people, was it you do your job you can't be fired. Exactly what he used to say many times.

Q. When did he say it to you?

A. Oh, gosh. I couldn't give you a date, or anything like that. I really couldn't, you know.

Q. Did he ever say it to you at that time you became the field maintenance or afterwards, or was it prior to that?

(*concluded on page 7*)

statement during a meeting the purpose of which was to discuss Georgia-Pacific's Operating Procedure Manual. (*Id.*, at pp. 30-32).

In addition to the oral assurances made by Norman, Norman also prepared a memorandum indicating Vollrath's employment with Georgia-Pacific to be secure. The memorandum provides:

> "As mutually agreed upon, in the event that problems arise in Harley's performance as Maintenance Supervisor, he will be given the option to Area Supervisor."

That memorandum served to reinforce both the notion of job security and Norman's authority to make such representations. (*See id.*, at pp. 109-110, 118-119).

Although the 1983 and 1985 Operating Procedure Manuals have indications that the official policy of Georgia-Pacific seemed to be that its employees served at the will of the company; however, Norman, acting as a plant manager for Georgia-Pacific, both failed to enforce that policy and consistently negated it on a number of occasions by indicating that the employees should not refer to it. Vollrath testified that he had no knowledge of Georgia-Pacific's at-will policy. (*See*, Deposition of Harley Vollrath, at pp. 14, 17, 31-32, 36, 209, 292, 295-296); (*See also*, Deposition of David Norman, at p. 56). And, Norman, as previously stated, specifically stated during a meeting of supervisors to discuss the company's Operating Procedure Manual that the supervisors, including Vollrath, would continue

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(*continued from page 6*)

> A. He'd even said prior, before I was even — before I was the superintendent, even. While I was still first line supervisor or area maintenance he used to say it."

(Deposition of Harley Vollrath, at p. 241).

to be employed so long as they did their jobs. (*See*, Deposition of Harley Vollrath, at pp. 30-31).

Much has been made of Vollrath's role in discussions with Georgia-Pacific's attorneys in previous wrongful discharge suits brought while Georgia-Pacific still employed Vollrath. Merely because Vollrath attended meetings held by Georgia-Pacific's attorneys, at which those attorneys explained the defenses they intended to pursue in response to those wrongful discharge suits, fails to establish that those defense theories were, or are, the state of the law given the assurances of job security by Georgia-Pacific to its employees. Vollrath has testified that he did not discuss, with the attorneys, the termination policy. (Deposition of Harley Vollrath, at p. 19). The attorneys' statements constituted nothing more than defense theories, and it was not incumbent on Vollrath to contradict the theories as presented. (*See*, Deposition of Harley Vollrath, at p. 23). To assert that theories presented by attorneys in response to a lawsuit constitutes, without question, company policy is intellectually indefensible.

Georgia-Pacific also made much of contradictory statements and inability of Vollrath to recall certain events. Georgia-Pacific attacked Vollrath's credibility and asked the District Court to accord greater credibility to Georgia-Pacific's witnesses and accept as true what those individuals remember. The District Judge granted Defendant-Respondent's Motion for Summary Judgment. Vollrath contends that Defendant-Respondent's Motion should have been denied because questions of fact remain as to whether Georgia-Pacific employed Vollrath under an employment contract that required good cause for Defendant-Respondent to terminate Vollrath and whether good cause for the termination existed. Vollrath argued to the Sixth Circuit that Mich-

igan law dictated that the District Judge's decision be reversed. The Sixth Circuit instead affirmed the District Judge's decision, holding that Georgia-Pacific's employment contract with Vollrath did not require just cause to discharge Vollrath. The Sixth Circuit also denied Vollrath's Motion for Rehearing.

ARGUMENT

I.

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IS FAILING TO APPLY MICHIGAN LAW GOVERNING WRONGFUL TERMINATION CLAIMS.

The sole issue presented by this application is whether the United States Court of Appeals for the Sixth Circuit has failed to apply the *Erie* doctrine in this case. That the Sixth Circuit has failed to apply Michigan law in deciding whether a contract exists in state law claims of wrongful discharge is not new.

In *Pratt* v. *Brown Machine Co.*, 855 F.2d 1225 (6th Cir. 1988), the court failed to apply a decision of the Michigan Court of Appeals, *i.e.*, *Dalton* v. *Herbruck Egg Sales Corp.*, 164 Mich. App. 543, 417 N.W.2d 496 (1987). The *Pratt* court's rationale was that it was not required to follow the intermediate appellate decision if the state supreme court would have decided that case otherwise.[6] The court, however, could not point to any

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[6] 855 F.2d at 1234 n. 11:

> "The dissent takes us to task for refusing to follow the decision of the Michigan Court of Appeals in *Dalton* v. *Herbruck Egg Sales Corp.*, 164 Mich. App. 543, 417 N.W.2d 496 (1987). While it is true that '[t]he law of Michigan is controlled by a decision of the Michigan Court of Appeals

(*concluded on page 10*)

other decision of the Michigan Court of Appeals or the Michigan Supreme Court that indicated that *Dalton* was wrongly decided. Rather, the *Pratt* court referred the reader to *Reid* v. *Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986).

The decision in *Pratt* is indicative of the treatment by the Sixth Circuit of wrongful discharge cases. The court in *Pratt* misapplied the principle that a federal court deciding a state law claim may ignore a decision of the state's intermediate appellate court.

The rule that a federal court need not blindly accept the decision of an intermediate appellate court finds its roots in the cases decided by this Court soon after it decided *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938). The rule is found in *Stoner* v. *New York Life Ins. Co.*, 311 U.S. 464, 467, 61 S. Ct. 336, 85 L. Ed. 284, 287 (1940);[7] *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 237, 61 S. Ct. 179, 85 L. Ed. 139, 144

(*continued from page 9*)

> until the Michigan Supreme Court or another panel of the Michigan Court of Appeals rules otherwise,' *Wieczorek* v. *Volkswagenwerk, A.G.*, 731 F.2d 309, 310 (6th Cir. 1984) (citations omitted), it is equally true that we need not blindly follow such precedent where we are '"convinced by other persuasive data that the highest court of the state would decide otherwise."' *Kochins* v. *Linden-Alimak, Inc.*, 799 F.2d 1128, 1140 (6th Cir. 1986) (quoting *Clutter* v. *Johns-Manville Sales Corp.*, 646 F.2d 1141, 1153 (6th Cir. 1981))."

[7] "We have recently held that in cases where jurisdiction rests on diversity of citizenship, federal courts . . . must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently . . . In particular this is true where the intermediate state court has determined the precise question in issue in an earlier suit between the same parties, and the highest court of the state has refused review."

(1940);[8] *Fidelity Union Trust Co.* v. *Field*, 311 U.S. 169, 177-178, 861 S. Ct. 176, 85 L. Ed. 109 (1940); *Six Counties of California* v. *Joint Highway Dist. No. 267*, 311 U.S. 180, 188, 61 S. Ct. 186, 85 L. Ed. 114 (1940). The Sixth Circuit, however, has misapplied that rule in holding that a just cause employment contract existed in cases in which the Michigan courts would have held that the existence of a just cause employment contract is a jury question.

The Sixth Circuit has continued the trend of ignoring Michigan law in this case. This case presents jury questions as to the existence of a just cause employment contract and the absence of just cause for Vollrath's termination. *See* §§ II A & C, *infra*. In holding that the contract did not require just cause, the Sixth Circuit completely misapplied a Michigan Supreme Court opinion in affirming the District Court's grant of Defendant-Respondent's Motion for Summary Judgment on Vollrath's wrongful discharge claim. *See* § II B, *infra*.

II.

THERE REMAIN QUESTIONS OF MATERIAL FACT AS TO HARLEY VOLLRATH'S WRONGFUL TERMINATION CLAIM.

A. Michigan Law Dictates That A Jury Question Is Presented When The Employee-Plaintiff Produces Evidence That The Employer-Defendant Made Representations, Oral Or Written, That The Employment Relationship Would Be Terminated Without Good Cause.

Georgia-Pacific contends that it had a right to terminate Vollrath with or without good cause to do so.

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[8] "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."

Georgia-Pacific's Operating Procedure Manual, on the other hand, indicated to Vollrath that the company had a policy assuring job security. Those statements of company policy created a contractual right to be terminated only when the company had good cause for the termination. Because the statements of company policy fail to support Georgia-Pacific's position that Vollrath did not have a contractual right to the effect that Georgia-Pacific could terminate Vollrath only for good cause, a grant of Georgia-Pacific's Motion for Summary Judgment would be erroneous.

The Michigan Supreme Court, in *Toussaint* v. *Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980), held that an employer's oral or written statements concerning job security may transform an at-will employment relationship into an employment relationship that can be terminated by the employer only when just cause exists. *Toussaint* involves two cases consolidated on appeal: *Toussaint* v. *Blue Cross & Blue Shield of Michigan* and *Ebling* v. *Masco Corp.* Both cases involved representations made by employers that the employees would have jobs so long as they performed their respective jobs satisfactorily. Each employer subsequently discharged those employees without good cause to do so and defended the action by contending that, notwithstanding the assurances to the employee of continued employment, the employee remained an employee-at-will who could be terminated at any time with or without good cause.

The Michigan Supreme Court disagreed with the defendants and held that, when an employer makes representations, either written or oral, an employee will continue to be employed so long as that individual continues doing the assigned work in a satisfactory

manner that the employee can be terminated only for good cause. The court's opinion provides:

> "We hold that:
>
> 1) a provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable although the contract is not for a definite term the term is 'indefinite';
>
> 2) such a provision may become part of the contract wither by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in the employer's policy statements."
>
> * * *
>
> "4) a jury could also find for Toussaint based on legitimate expectations grounded in his employer's written policy statements set forth in the manual of personnel policies."

Id. at 598, 292 N.W.2d at 885.

The statements need not be expressed in a written contractual statement over which the parties have bargained. In fact, the employees need not see or rely on the policy statements prior to the commencement of employment.[9] All that is necessary is that the employer

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[9] *Toussaint* v. *Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 614-615, 292 N.W.2d 880, 892 (1980):

> "We hold that employer statements of policy . . . can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee, and, hence, although the statement of policy is signed by neither party, can be unilaterally amended by the employer without notice to the employee and contains no reference to a specific employee, his reference was made to the policy statement in pre-employment interviews and the employee does not learn of its existence until after his hiring."

has implemented a policy regarding employment and termination such that employees have a reasonable expectation that it will be uniformly applied to all employees.[10] The *Toussaint* court also held that the existence of such an employment contract is a question for the jury. *See, id.* at 614, 292 N.W.2d at 892.[11]

Similarly, in *Renny* v. *Port Huron Hospital*, 427 Mich. 415, 398 N.W.2d 327 (1986), the court held that a jury question is presented as to the terms of the employment contract when the plaintiff presents evidence of job security. In so holding, the court stated:

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[10] *Toussaint* v. *Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 613, 292 N.W.2d 880, 892 (1980):

> "While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, co-operative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties' minds need never meet on the subject, *nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices* or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, *and are applied consistently and uniformly to each employee.*" (Emphasis added.)

See also, Schipani v. *Ford Motor Co.*, 102 Mich. App. 606, 612, 302 N.W.2d 307, 311 (1981) ("Here, as in *Toussaint*, it is for the trier of fact to determine whether the contract was not terminable at will because of the defendant employer's oral or written assurances.")

[11] The *Toussaint* court made it clear that an employer can negate any claim by employees that they could be terminated only for just cause. The employer must explicitly state the employees are employeed at the will of the company. *See*, 408 Mich. at 612 n. 24, 292 N.W.2d at 891 n. 24.

> "We find that the trial court properly submitted the question of a just-cause contract to the jury. The existence of a just-cause contract is a question of fact for the jury where the employer establishes written policies and procedures by which to discharge an employee, but does not expressly retain the right to terminate employees at will."

Id. at 417, 398 N.W.2d at 329.[12]

In *Dalton* v. *Herbruck Egg Sales Corp.*, 164 Mich. App. 543, 417 N.W.2d 496 (1987), the court held that an employment contract that contains contradictory terms on the reasons that must be given for discharge is ambiguous and creates a question of fact to be resolved by the jury.[13] In that case, Herbruck Egg discharged Dalton

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[12] That a contract containing inconsistent or ambiguous terms is to be resolved by a jury is axiomatic. This principle is equally applicable to good cause employment contracts in that the court held in *Valentine* v. *General American Credit, Inc.*, 420 Mich. 256, 362 N.W.2d 628 (1984), that "*Toussaint* makes employment contracts which provide that an employee will not be dismissed except for cause enforceable in the same manner as other contracts." *Id.* at 258, 362 N.W.2d at 629.

The Michigan Court of Appeals has also held, on a number of occasions, that the question of the existence of an employment contract to terminate only for good cause is a jury question when evidence of assurances of job security is produced. *See, Dalton* v. *Herbruck Egg Sales Corp.*, 164 Mich. App. 543, 547, 417 N.W.2d 496, 498 (1987) (progressive disciplinary process is indication of job security); *Ritchie* v. *Michigan Consolidated Gas Co.*, 163 Mich. App. 358, 368-371, 413 N.W.2d 796, 800-801 (1987); *Struble* v. *Lacks Industries Co., Inc.*, 157 Mich. App. 169, 175, 403 N.W.2d 71, 74 (1986); *Hetes* v. *Schefman & Miller Law Office*, 152 Mich. App. 117, 121, 393 N.W.2d 577, 578 (1986) (oral assurances of job security); *Schipani* v. *Ford Motor Co.*, 102 Mich. App. 606, 613, 302 N.W.2d 307, 311 (1981).

[13] A panel of the Sixth Circuit opined in *Pratt* v. *Brown Machine Co.*, 855 F.2d 1225 (6th Cir. 1988), that the Michigan Supreme Court would have decided *Dalton* contrary to the opinion of the Michigan Court of Appeals. Vollrath submits that the *Dalton* decision is consistent with previous decisions of the Michigan Supreme Court.

from his employment with Herbruck Egg without first complying with the stepwise disciplinary proceeding set forth in the employee handbook. Dalton then brought a wrongful termination suit against Herbruck Egg. Herbruck Egg moved for summary disposition contending that the phrase in the handbook, that the handbook provides that the handbook is not a contract, negates Dalton's claim that he could be discharged only pursuant to the disciplinary procedure set forth in the employee handbook. The trial court judge granted the defendant's motion. The Court of Appeals reversed the trial court judge's decision and remanded.

The Court of Appeals held that whether the disciplinary procedure set forth in the handbook constituted a just cause employment contract is a question of fact for the jury. In so holding, the Court held:

> "We believe that the trial judge erred in dismissing plaintiff's action because a jury question existed concerning whether there was an implied employment contract between the parties. The employee handbook, while providing that its provisions were not a contract and that an employee could be terminated at will, also set forth provisions from which plainfiff could have concluded that he would not be reprimanded for his conduct or, at the very most would receive only a verbal warning. The tenor of the entire handbook is that all employees will be fairly and justly treated and treated in accordance with the procedures set forth in the handbook. *Where a policy manual provides both a 'for cause' termination policy and a terminable at will policy, the question of whether an employment contract with a just cause termination policy has*

> *been formed is a question of fact to be resolved by the jury."*

Id. at 547, 417 N.W.2d at 498. (Emphasis added.)[14]

Similarly, in *Langeland* v. *Bronson Methodist Hospital*, 178 Mich. App. 612, 444 N.W.2d 146 (1989), the court reaffirmed the *Dalton* holding. In *Langeland*, the court held that

> "Absent an express retention of the right to terminate employment at will, the existence of a just-cause contract is a question of fact for the jury. *Renny* v *Port Huron Hospital*, 427 Mich 415, 417; 398 NW2d 327 (1986), *reh den* 428 Mich 1206 (1987). Similarly, a jury question exists when an employer's stated termination policies contain expressions of both at-will and just cause employment. *Dalton* v *Herbruck Egg*

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[14] *See also, Schipani* v. *Ford Motor Co.*, 102 Mich. App. 606, 613, 302 N.W.2d 307, 311 (1981):

> "The Court of Appeals in *Kari* v *General Motors Corp*, 79 Mich App 93, 261 NW2d 222 (1977), held that where the defendant employer specifically stated that its separation and pay schedule and conditions, contained in its handbook, were not intended to establish a contractual relationship, '[a]n employee reading this language and that of the general disclaimer at the end of the booklet would have realized that further negotiations, and not merely the acceptance of an employment with General Motors, are necessary to create a contract for severance pay.' However, *the Supreme Court reversed Kari* v *General Motors, supra,* by order in lieu of leave to appeal, 402 Mich 926 (1978), *remanding the action to the trial court to consider all of plaintiff's claims including claims raised by plaintiff's interpretation of the handbook and possible oral promises to award the separation allowance. This remand may indicate the Supreme Court's belief that under appropriate circumstances, oral promises may negate the effect of disclaimers which are intended to absolve employers from liability for policies presented in handbooks or other employer literature."*

(Emphasis added.)

> *Sales Corp*, 164 Mich App 543, 547; 417 NW2d 496 (1987)."

178 Mich. App. at 615, 444 N.W.2d at 148.

In *Langeland*, the employee handbook contained expressions indicating both a just-cause employment relationship and an at-will employment relationship. The manual defined "discharge" as "termination at the will of the employer"; however, the handbook qualified the definition by requiring "'some fault on the part of the worker.'" *Id.* at 616, 444 N.W.2d at 148. The court also focused on the portion of the handbook that provided for discharge:

> "Defendant's policies enumerate twenty offenses which may lead to employee discipline and outline the normal disciplinary procedures which precede termination. Although the policies state that the execution of such procedures is a matter of 'management prerogative,' other language suggests that immediate dismissal is an extraordinary penalty to be used only for the most serious infractions, such as theft or falsification of company records."

Id. at 616. The plaintiff, therefore, had raised a jury question concerning the terms of the employment contract. [15]

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[15] *Id.* at 616-617, 444 N.W.2d at 149:

> "We also agree with plaintiff's argument that his deposition testimony was sufficient to create a jury question on the issue of his subjective expectation that his employment could be terminated only for just cause. We are unpersuaded by defendant's argument that certain portions of plaintiff's testimony amount to an admission that his employment contract was terminable at will. While plaintiff conceded that it was for defendant's administrators to determine whether certain conduct warranted dismissal,

(*concluded on page 19*)

Whether a jury question exists, therefore, is dependent on whether evidence of assurance of job security is produced. Here, Vollrath testified that his superior, Norman, told Vollrath, among others, that if Georgia-Pacific employees did their jobs they could not be terminated by Georgia-Pacific.[16]

B. Georgia-Pacific's Unilateral Promulgation Of An At-Will Policy In The 1983 And 1985 Operating Procedures Manuals Fails To Alter The Terms Of Vollrath's Employment Contract.

Georgia-Pacific claimed, and the Sixth Circuit held, that the promulgation of at-will policies altered the employment relationship between Georgia-Pacific and Vollrath. Such unilateral promulgation of personnel policies, however, cannot, in and of itself, override an express oral contract that the employee can be termi-

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(*continued from page 18*)

> plaintiff did not say he believed that defendant could terminate his employment in violation of defendant's stated policies or bypass the disciplinary procedure set forth therein. Whether plaintiff's beliefs were reasonable and whether defendant did indeed violate its disciplinary policies were questions of fact to be decided by the jury. *Struble* v *Lacks Industries, Inc*, 157 Mich App 169, 175; 403 NE2d 71 (1986)."

[16] Compare the oral assurance made by Norman to Vollrath with the oral assurances made in the following cases that held a jury question exists as to the terms of the employment contract: *Bullock* v. *Automobile Club of Michigan*, 432 Mich. 472, 475-477, 444 N.W.2d 114, 115 (1989) (the plaintiff would have a lifetime job as long as he did not steal); *Toussaint* v. *Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 597 n. 5, 292 N.W.2d 880, 884 n. 5 (1980) (oral statement that the plaintiff would be terminated only for cause); *Ritchie* v. *Michigan Consolidated Gas Co.*, 163 Mich. App. 358, 364, 413 N.W.2d 796, 799 (1987) (statement, among others, that the plaintiff would have a job with the defendant as long as the employer continued to have a work location where the plaintiff was employed); *Hetes* v. *Schefman & Miller Law Office*, 152 Mich. App. 117, 119, 393 N.W.2d 577 (1986) (the plaintiff was told that she would have a job as long as she did a good job).

nated only for good cause. In this case, Georgia-Pacific employed Vollrath pursuant to an express oral contract, the express terms of which could not be unilaterally modified by Georgia-Pacific.

In *Bullock* v. *Automobile Club of Michigan*, 432 Mich. 472, 444 N.W.2d 114 (1989), the court held that the mere issuance of an employee manual containing an at-will disclaimer is ineffective in modifying an express employment contract providing for termination only for good cause. The *Bullock* court emphasized that an employment contract may be established in any number of ways.[17] The question then to be resolved was whether the employer could unilaterally modify an express employment contract that required good cause for termination. The court held that such a unilateral modification is merely an offer of modification subject to acceptance by the affected employee.[18]

In *Bullock*, the defendant argued that the plaintiff's continued employment constituted acceptance of the

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[17] *Id.* at 480, 444 N.W.2d at 117:

> "While the policy manual legitimate expectations analysis of *Toussaint* v *Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980), may have in practice obscured that portion of the opinion dealing with a contract arising from an express agreement, oral or written, it is clear that the *Toussaint* majority held both that a provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable and that the contract may be established in alternative ways."

[18] *Id.* at 483, 444 N.W.2d at 119:

> "The employment manuals submitted by the defendant, to the extent that they do not constitute unilateral modification of the policy basis of plaintiff's claim, must be seen on this record as an *offer to modify the discharge-for-cause provision of Bullock's alleged express contract and do not entitle the defendant to summary disposition.*"

(Emphasis added.)

at-will policy set forth in the employee manual by the defendant. Although the *Bullock* majority did not specifically address that argument, Justice Levin, concurring, found the argument to be unpersuasive:

> "AAA maintains that unilateral contract principles bind Bullock to AAA's revisions regardless of the original terms of the employment contract. Under this analysis, when an employer unilaterally changes its policies, an employee's continued performance constitutes consideration for, and acceptance of, the new terms of employment. An employee is then bound by the new terms and can no longer rely on the employer's prior policies.
>
> In *In re Certified Questions*, this Court considered unilateral contract analysis in a case concerning an employer's unilateral change from a discharge-for-cause policy to a termination-at-will policy, and said that it found 'unilateral contract theory . . . inadequate as a basis for [its] answer . . . .'"
>
> Even if the revision in the manual in *In re Certified Question* from discharge for cause to termination at will was an offer by Storer Broadcasting Company of a change in the employment contract, there was no reason to suppose that the plaintiff, Kenneth Bankey, accepted such an offer. See *Thompson* v *Kings Entertainment*, 653 F Supp 871 (ED Va, 1987), where the court said that the employer failed to show that the employee had accepted the revision in policy from dismissal for cause to termination at will."

Id. at 505-506, 444 N.W.2d at 129.[19]

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[19] Justice Levin refers to a case decided at the same time the court decided *Bullock — In re Certified Question (Bankey* v. *Storer Broadcasting Co.)*, 432 Mich. 438, 443 N.W.2d 112 (1989). There the

(*concluded on page 22*)

In this case, Norman made a number of oral statements to Vollrath that Vollrath could be discharged only for good cause. Norman made those statements to Vollrath as early as 1981. Georgia-Pacific, however, insists that the disclaimers issued in 1983 and 1985 completely negate Norman's statements.[20]

The 1983 OPM provided that Georgia-Pacific's employees were employed at the will of the company and that the contract could be modified only in writing:

(*continued from page 21*)

court held that an employer may modify the employment relationship from a just-cause one to an at-will one by the unilateral issuance of an employee handbook that contains an at-will disclaimer if the just-cause relationship was based solely on the previous employee handbook.

[20] The panel of the Sixth Circuit that decided this case has misconstrued the *Bullock* holding and rationale. The panel stated, in pertinent part:

> "In his reply brief, appellant argues that the present case is similar to *Bullock* v. *Automobile Club of Michigan*, 432 Mich. 472 (1989). In *Bullock*, appellant argues, the court indicated that the issuance of an employee manual containing an at will disclaimer does not effectively modify an express employment contract which preceded the manual. The plaintiff in *Bullock*, an insurance salesman, alleged that when he was hired he was promised he could continue to receive 7% commission on his 'book of business,' the accumulated memberships and policies he built up over the years. After plaintiff had worked under this agreement for a number of years, the employer revised that program so that instead of a percentage of the commissions on those memberships and policies, the salesman received only a certain amount for each, an amount less than the percentage. Plaintiff failed to generate the required minimum commissions under the revised program and was discharged. The court held that there was an express promise to pay 7% commissions on the agent's 'book of business.' Plaintiff here did not rely on an express contract. Rather, he was relying upon an employer's policy statements. Those policy statements could be and were modified by the written policy statement."

899 F.2d at 536.

> "No employee or representative of Georgia-Pacific, other than the Chief Executive Officer or the Corporate Director–Employee Relations and Administrative Services, has any authority to enter into any agreement extending the employment of any employee for only specific periods of time, or to make any agreement contrary to the foregoing."

The 1985 OPM provides:

> "It is the policy of Georgia-Pacific that the employment and compensation of any employee can be terminated, with or without cause, at any time, at the option of the employee or at the option of the company. Specific procedures to be followed depend upon the circumstances of the termination. Any questions about this policy should be referred to the office of the Vice President–Human Resources."

Georgia-Pacific, however, had already become bound to a just cause employment contract because of oral statements made to Vollrath.

In this case, the applicable employee manual, the 1985 OPM, stated that Georgia-Pacific's employees were employees at the will of the company. The plant manager of the Kalamazoo plant, however, stated to Vollrath that he had job security at Georgia-Pacific. The oral representations of the plant manager constitute an express contract between Vollrath and Georgia-Pacific that may be modified by Georgia-Pacific only with Vollrath's assent. Unilateral modification of that contract by the mere issuance of employee handbooks is ineffective in modifying the employment contract.

It is noteworthy that the oral assurances to Vollrath, through David Norman, emphasized long-term security

afforded to Georgia-Pacific's employees. No mention, however, was made of any disclaimer contained within the Operating Procedure Manual. Vollrath then relied on the oral assurances of job security.

C. There Remains A Question Of Material Fact As To Whether Georgia-Pacific Had Good Cause To Discharge Harley Vollrath, Which Is A Question Of Fact To Be Determined By The Jury.

The question of whether an employer had good cause to discharge one of its former employees is clearly a fact-specific one. An array of factors are involved in the decision to discharge an employee, including work performance, the employee's attitude, and the facts and circumstances surrounding the discharge. Whether the employer had good cause to discharge the former employee is a question that is not conducive to disposition in a Summary Judgment proceeding.

In *Toussaint* v. *Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980), the court held that the question of whether good cause existed to discharge the former employee is a question for the jury. There, the court expressly discussed the role of the jury in determining whether good cause existed for the discharge.

> "We all agree that where an employer has agreed to discharge an employee for cause only, its declaration that the employee was discharged for unsatisfactory work is subject to judicial review. The jury as trier of facts decides whether the employee was, in fact, discharged for unsatisfactory work . . .
>
> The role of the jury will differ with each case. Where the employer claims that the employee

was charged for specific misconduct — intoxication, dishonesty, insubordination — and the employee claims that he did not commit the misconduct alleged, the question is one of fact for the jury: did the employee do what the employer said he did?"

* * *

"Where an employee is discharged for stated reasons which he contends are not 'good cause' for discharge, there is the danger that it will substitute its judgment for the employer's. If the jurors would not have fired the employee for doing what he admittedly did, or they find he did, the employer may be held liable in damages although the employee was discharged in good faith and the employer's decision was not unreasonable.

While the promise to terminate employment only for cause includes the right to have the employer's decision reviewed, it does not include a right to be discharged only with the concurrence of the communal judgment of the jury. Nevertheless, we have considered and rejected the alternative of instructing the jury that it may not find a breach if it finds the employer's decision to discharge the employee was not unreasonable under the circumstances."

* * *

"Where the employee has secured a promise not to be discharged except for cause, he has contracted for more than the employer's promise to act in good faith or not to be unreasonable. An instruction which permits the jury to review

only for reasonableness inadequately enforces that promise.

In addition to deciding the questions of fact and determining the employer's true motive for discharge, the jury should, where such a promise was made, decide whether the reason for discharge amounts to good cause: is it the kind of thing that justifies terminating the employment relationship? Does it demonstrate that the employee was no longer doing the job?"

Id. at 621-623, 292 N.W.2d at 896.

A panel of the Sixth Circuit reaffirmed, in *Diggs* v. *Pepsi-Cola Metropolitan Bottling Co.*, 861 F.2d 914 (6th Cir. 1988), that the question of good cause is one for the jury:

"Pepsi-Cola argues that the district court was bound as a matter of law to uphold its determination that customer complaints lodged against Diggs provided just cause for his discharge as a matter of law. It contends that any other holding, in effect, relegates essential employment decisions to the courts, not to the employer charged with such responsibilities. It is indeed true that the trial court accepted the fact that the complaints actually occurred and that they were serious in nature. Thus, Pepsi-Cola argues that anything other than a finding of good cause was an impermissible interference with its business judgment.

Pepsi-Cola states that 'the Michigan Supreme Court has provided little guidance on the meaning of the just cause . . . .' the answer to the claim lies in the language of *Toussaint* itself. The court states, '[A] promise to terminate

> employment for cause only would be illusory if the employer were permitted to be the sole judge and final arbiter of the propriety of the discharge.' *Toussaint*, 408 Mich. at 621, 292 N.W.2d at 895. The court went on to say that 'the jury should . . . decide whether the reason for discharge amounts to good cause.' *Id.* at 623, 292 N.W.2d at 896. The Michigan Supreme Court recently reaffirmed this position in *Renny* v. *Port Huron Hospital*, 427 Mich. 415, 429, 398 N.W.2d 327, 335 (1986):
>
> > 'The jury decides as a matter of fact whether the employee was discharged for cause. While the jury may not substitute its opinion for that of the employer's, it may determine whether the employee committed the specific misconduct for which he was fired, whether the reason for discharge amounts to good cause, or whether the employer was selectively applying the rules. It is not enough that an employer acted in good faith or was not unreasonable.'"

Id. at 920-921.

That the existence of good cause for the discharge is a jury question has ample other support. *See, Wiskotoni* v. *Michigan National Bank – West*, 716 F.2d 378, 386 (6th Cir. 1983); *Ritchie* v. *Michigan Consolidated Gas Co.*, 163 Mich. App. 358, 368-371, 413 N.W.2d 796 (1987); *Struble* v. *Lacks Industries Co., Inc.*, 157 Mich. App. 169, 175, 403 N.W.2d 71, 74 (1986); *Hetes* v. *Schefman & Miller Law Office*, 152 Mich. App. 117, 121, 393 N.W.2d 577, 578 (1986); *Rasch* v. *City of East Jordan*, 141 Mich. App. 336, 367 N.W.2d 856 (1985); *Schwartz* v. *Michigan Sugar Co.*, 106 Mich. App. 471, 477-478, 308 N.W.2d 459, 462 (1981); *Schipani* v. *Ford*

Motor Co., 102 Mich. App. 606, 612, 302 N.W.2d 307, 311 (1981).

There is contradictory testimony as to whether Georgia-Pacific had good cause for Vollrath's termination. Vollrath's performance reviews were consistently high. There also exist questions about whether there was, in fact, a reduction in the work force as claimed by Georgia-Pacific. Because the issue is unclear, it is impossible to determine as a matter of law whether Defendant-Respondent had good cause to terminate Vollrath.

Vollrath argued that the alleged offer of a position at the Taylorsville plant casts doubt on Georgia-Pacific's contention that it terminated Vollrath as a result of an economic reduction in the workforce. The Sixth Circuit never reached this issue. Furthermore, the issue is currently pending before the Michigan Supreme Court. *See, McCart* v. *J. Walter Thompson, U.S.A., Inc.*, 181 Mich. App. 611, 450 N.W.2d 10 (1989), *leave granted*, 434 Mich. 909 (1990).

CONCLUSION

Plaintiff-Petitioner respectfully requests that this Court grant his petition for a writ of certiorari to the U.S. Court of Appeals for the Sixth Circuit and reverse that Court's decision.

Respectfully submitted,

SOMMERS, SCHWARTZ, SILVER & SCHWARTZ, P.C.

By: /s/ LIONEL J. POSTIC (P37120)
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Dated: August 29, 1990

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

ORDER DENYING PETITION FOR REHEARING

(United States Court of Appeals — Sixth Circuit)

(Filed May 31, 1990)

(HARLEY VOLLRATH, Plaintiff-Appellant, v. GEORGIA-PACIFIC CORPORATION, A FOREIGN CORPORATION, Defendant-Appellee — No. 89-1207)

BEFORE: KENNEDY and RYAN, Circuit Judges; and EDWARDS, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

APPENDIX B

OPINION

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

(United States Court of Appeals — Sixth Circuit)

(Decided and Filed March 30, 1990)

(HARLEY VOLLRATH, Plaintiff-Appellant, v. GEORGIA-PACIFIC CORPORATION, Defendant-Appellee — No. 89-1207; ON APPEAL from the United States District Court for the Western District of Michigan)

Before: KENNEDY and RYAN, Circuit Judges; and EDWARDS, Senior Circuit Judge.

KENNEDY, Circuit Judge.

Vollrath, a former high-level management employee for appellee Georgia-Pacific Corporation, apepals the summary judgment of dismissal of his complaint alleging wrongful discharge in violation of an implied employment contract terminable only for cause. Vollrath asserts that there remain questions of material fact regarding his claim of wrongful termination. We find that there is no genuine issue as to any material fact and that appellee is entitled to a judgment as a matter of law. Accordingly, we AFFIRM the District Court's order granting Georgia-Pacific's Motion for Summary Judgment.

Georgia-Pacific operates a small paper mill in Kalamazoo, Michigan. It hired appellant to work as a utility person on or around April 13, 1967. Appellant later became an electrician-millwright. In 1983, appellee promoted appellant to the position of Area Maintenance Supervisor of the Kalamazoo mill. In

January 1986, appellant accepted the newly created position of Field Maintenance Representative. On April 7, 1986, he was discharged from that position.

Appellant alleges that appellee discharged him without just cause and without providing him an opportunity to return to the Area Maintenance Suipervisor position, thereby breaching a contractual obligation. Appellant claims that he had a legitimate expectation of dismissal only for cause based upon representations made by the Kalamazoo plant manager. First, appellant claims that the plant manager represented to him in informal conversations that he would continue in employment as long as he continued to do his job. Second, appellant provides evidence of a memorandum given to him by the plant manager around March of 1984†, which stated:

> As mutually agreed upon, in the event that problems arise in Harley's performance as Maintenance Superintendent, he will be given the option to return to Area Supervisor.

Appellee maintains that Vollrath was an employee terminable at will. Further, appellee argues that Vollrath was discharged because his position was eliminated for economic reasons as part of a gradual reduction in the work force at the Kalamazoo facility.

Appellee bases its assertion that appellant was an employee at will on the fact that in 1983 appellee had prepared and distributed an Operating Policy Manual (OPM) to certain salaried supervisory employees, including appellant.

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† [*Printer's Note*: Pursuant to instructional letter of 4/3/90 from L. Green, Court clerk, the year as printed above has been changed from the original "1904," a typographical error.]

In 1985, appellee updated its OPM, further clarifying its at will policy. The 1983 OPM provides, in relevant part:

> It is the policy of Georgia-Pacific that the employment and compensation of any employee can be terminated, with or without cause, at any time, at the option of the employee or at the option of the company. No employee or representative of Georgia-Pacific, other than the Chief Executive Officer or the Corporate Director – Employee Relations and Administrative Services, has any authority to enter into any agreement extending the employment of any employee for any specified period of time, or to make any agreement contrary to the foregoing.

The 1985 OPM provides in relevant part:

> It is the policy of Georgia-Pacific that the employment and compensation of any employee can be terminated, with or without cause, at any time, at the option of the employee or at the option of the company. Specific procedures to be followed depend upon the circumstances of the termination. Any questions about this policy should be referred to the office of the Vice President – Human Resources.

Later, it provides:

> 5. **Other Involuntary Discharges.** There may be grounds for discharge other than those discussed above. This discussion is not meant to be inclusive or to limit in any way management's freedom to discharge an employee at any time for any reason not prohibited by law.

In reviewing the District Court's grant of summary judgment, we are required to review "de novo" the District Court's findings. *Burkart* v. *Post-Browning, Inc.*, 859 F.2d 1245, 1249 (6th Cir. 1988). Summary judgment is appropriate where:

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). A material issue of fact exists where a reasonable jury, viewing the evidence in the light most favorable to the non-moving party, could return a verdict for that party. *Boddy* v. *Dean*, 821 F.2d 346, 349 (6th Cir. 1987).

The party moving for summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record demonstrating the absence of a material issue of fact. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986); *Potters Medical Center* v. *City Hosp. Ass'n*, 800 F.2d 568, 572 (6th Cir. 1986). The non-moving party must then go beyond the pleadings and come forward with specific facts showing that there is a genuine issue of material fact. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324. If after adequate discovery the party bearing the burden of proof fails to make a showing sufficient to establish an essential element of his or her claim, summary judgment is appropriate. Fed. R. Civ. P. 56(e).

Under Michigan law, "[e]mployers and employees remain free to provide, or not to provide, for job security. Absent a contractual provision for job security, either the employer or the employee may ordinarily

terminate an employment contract at any time for any, or no, reason." *Valentine* v. *General American Credit, Inc.*, 420 Mich. 256, 258-59 (1984) (footnote omitted). However, where an employer adopts a policy of discharge only for cause, through either formal or informal actions, an employee has a right to rely on that policy and may not be discharged in violation of such a policy. *Toussaint* v. *Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 598 (1980). Therefore, in order to withstand defendant's motion for summary judgment, appellant must demonstrate that a genuine issue of material fact exists as to whether Georgia-Pacific, through formal or informal actions, adopted a policy of discharge only for cause.

Both the 1983 and the 1985 OPMs explicitly set forth Georgia-Pacific's at will policy with respect to terminations. Neither of the bases upon which appellant claims his expectation of dismissal only for cause rested persuade us that this policy was modified once it was established.

Vollrath's assertion that the plant manager told him and others on numerous occasions that he would not lose his job if he did his job established at most a subjective expectation of dismissal only for cause. As the District Court noted, comments regarding continued employment such as chances are "very good" do not affect the company's termination policy. *See Pratt* v. *Brown Mach. Co.*, 855 F.2d 1225, 1234 (6th Cir. 1988). Further, a "'subjective expectation does not create an enforceable contract right.'" *Dell* v. *Montgomery Ward and Co.*, 811 F.2d 970, 974 (6th Cir. 1987) (quoting *Sepanske* v. *Bendix Corp.*, 147 Mich. App. 819, 827 (1985)).

The memorandum written from the plant manager to Vollrath did not create an implied contract, for it was

written at the time the 1983 OPM was in effect, and the written 1983 at will policy specifically indicated that it could not be modified except by the Chief Executive Officer of the corporation. Further, Vollrath admitted in his deposition that he was aware that the company could unilaterally change its policies and that he would be bound by them. In *Toussaint*, 408 Mich. at 619, the court states that "[e]mployers can make known to their employees that personnel policies are subject to unilateral changes by the employer. Employees would then have no legitimate expectation that any particular policy will continue to remain in force."

Appellant attempts to rely upon *Dalton* v. *Herbruck Egg and Sales Corp.*, 164 Mich. App. 543 (1987), wherein the Michigan Court of Appeals held, "Where a policy manual provides both a 'for cause' termination policy and a terminable at will policy, the question of whether an employment contract with a just cause termination policy has been formed is a question of fact to be resolved by the jury." *Id.* at 547. Even if two termination policies were provided for by Georgia-Pacific in the present case, this case is not analogous to *Dalton*, for the Georgia-Pacific policy manuals clearly provide only for an at will termination policy. Appellant argues that the for cause termination policy arose through a separate statement, not through the manuals. In appellant's initial statement of facts, he claims that the oral statement on which he relied occurred after the issuance of the 1983 and 1985 OPMs. Furthermore, as appellant admits, this Court has held that "we need not blindly follow such precedent [*Dalton*] where we are 'convinced by other persuasive data that the highest court of the state would decide otherwise,'" and that "*Dalton* is inconsistent with the teachings of *Toussaint* and its progeny . . . ." *Pratt* v. *Brown Mach. Co.*, 855 F.2d at 1234 n. 11 (citing *Kochins* v. *Linden-*

Alimak, Inc., 799 F.2d 1128, 1140 (6th Cir. 1986) (quoting *Clutter* v. *Johns-Manville Sales Corp.*, 646 F.2d 1151, 1153 (6th Cir. 1981)).

In his reply brief, appellant argues that the present case is similar to *Bullock* v. *Automobile Club of Michigan*, 432 Mich. 472 (1989). In *Bullock*, appellant argues, the court indicated that the issuance of an employee manual containing an at will disclaimer does not effectively modify an express employment contract which preceded the manual. The plaintiff in *Bullock*, an insurance salesman, alleged that when he was hired he was promised he could continue to receive 7% commission on his "book of business," the accumulated memberships and policies he built up over the years. After plaintiff had worked under this agreement for a number of years, the employer revised that program so that instead of a percentage of the commissions on those memberships and policies, the salesman received only a certain amount for each, an amount less than the percentage. Plaintiff failed to generate the required minimum commissions under the revised program and was discharged. The court held that there was an issue of fact as to whether there had been a breach of the express promise to pay 7% commissions on an agent's "book of business." Plaintiff here did not rely on an express contract. Rather, he was relying upon an employer's policy statements. Those policy statements could be and were modified by the written policy statement.

Appellant also asserts in his reply brief that his deposition testimony indicated that he does not recall reading the at will language of the 1985 OPM. Later in his deposition testimony, however, Vollrath admitted that he had read it. Although at an earlier deposition he indicated that he did not recall reading the termination section of the OPM, the latter testimony was taken

after his wife found his copy of the manual, and this event seemed to jog appellant's memory. Moreover, appellant "may not create a dispute of fact concerning an issue about which he has no recollection." *Pratt*, 855 F.2d at 1233.

We conclude that appellant has not met his burden of coming forward with specific facts showing that there is a genuine issue of material fact. Accordingly, we AFFIRM the District Court's order granting Georgia-Pacific's Motion for Summary Judgment.

APPENDIX C

JUDGMENT AND OPINION

(United States District Court —
Western District of Michigan — Southern Division)

(Dated December 5, 1988)

(HARLEY VOLLRATH, Plaintiff, v. GEORGIA-PACIFIC CORPORATION, Defendant — File No. K87-226 CA; Hon. Benjamin F. Gibson)

JUDGMENT

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 5th day of December, 1988.

PRESENT: HON. BENJAMIN F. GIBSON, DISTRICT JUDGE.

In accordance with the Opinion dated December 5, 1988, IT IS HEREBY ORDERED that the defendant Georgia-Pacific Corporation's motion for summary judgment is GRANTED and the instant lawsuit is dismissed, with prejudice.

IT IS SO ORDERED.

/s/ BENJAMIN F. GIBSON, U.S. DISTRICT JUDGE

(*Certification Omitted*)

OPINION

Plaintiff Harley Vollrath ("Vollrath") filed this action against defendant Georgia-Pacific Corporation ("Georgia-

Pacific") alleging breach of an implied contract of employment which required just cause for dismissal. Georgia-Pacific denies the existence of a just cause contract of employment, but alternatively asserts that since plaintiff's job was eliminated as a part of a reduction in workforce, plaintiff cannot assert a breach of employment contract claim for wrongful discharge. The basis of this Court's jurisdiction is diversity of citizenship pursuant to Title 28 United States Code Section 1332. Presently pending before the Court is defendant's motion for summary judgment. The Court has reviewed defendant's motion, plaintiff's response, defendant's reply brief, the arguments presented, and the evidence in support thereof. For the reasons stated below, Georgia-Pacific's motion for summary judgment is granted and the instant lawsuit is dismissed.

FACTS

According to Vollrath's complaint, Georgia-Pacific hired him to work as a utility person in or around April 13, 1967.[1] Vollrath later became an electrician-millwright. In 1981, Vollrath was promoted to the position of Area Maintenance Supervisor at a paper mill in Kalamazoo, Michigan. Vollrath was again promoted in 1983, this time to the position of Plant Maintenance Supervisor at the Kalamazoo mill. Ultimately, Vollrath was offered and accepted the newly created position of Field Maintenance Representative in January 1986. Vollrath was discharged from this position on April 7, 1986.[2]

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[1] Georgia-Pacific states in its answer that Vollrath was initially hired on October 20, 1967. However, the exact date is irrelevant for the purposes of this motion.

[2] Georgia-Pacific states in its answer that Vollrath's employment with Georgia-Pacific ended effective May 2, 1986. Again, the exact date is irrelevant for purposes of this motion.

Vollrath alleges that Georgia-Pacific breached its contractual obligation by discharging him without just cause and without providing him an opportunity to return to the Area Maintenance Supervisor position. Vollrath claims that he had a legitimate expectation of dismissal only for cause based on representations made by the Kalamazoo Plant Manager. First, Vollrath claims that the Plant Manager represented to him in informal conversations that he would continue in employment as long as he continued to do his job. Second, Vollrath provides evidence of a memorandum given to him by the Plant Manager around March of 1984 that stated:

> As mutually agreed upon, in the event that problems arise in Harley's performance as Maintenance Superintendent, he will be given the option to return to Area Supervisor.

Georgia-Pacific maintains that Vollrath was an employee terminable at will. Further, Georgia-Pacific argues that Vollrath was discharged because his position was "eliminated for economic reasons as part of an ongoing general directive to reduce the number of salaried employees on the Kalamazoo facility's payroll."

Georgia-Pacific prepared and distributed an Operating Policy Manual ("OPM") to certain salaried supervisory employees, including Georgia-Pacific. The 1983 OPM set forth a specific at-will disclaimer.[3] Further, it pro-

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[3] The 1983 OPM provides in the first paragraph of the section entitled "Termination of Employment — Salaried Employees":

> It is the policy of Georgia-Pacific that the employment and compensation of any employee can be terminated, with or without cause, at any time, at the option of the employee or at the option of the company. No employee or representative of Georgia-Pacific, other than the Chief Executive Officer or the Corporate Director–Employee Relations and Administrative Services, has any authority to enter into any agreement extending the employment of any employee for any specified period of time, or to make any agreement contrary to the foregoing.

vided that "there will be no exceptions to this policy without the prior written approval of the Chief Executive Officer of the Company." Vollrath conceded that he might have had a 1983 OPM and a copy was found in his office with his handwritten name on it. In 1985 Georgia-Pacific updated its OPM, further clarifying its at-will policy.[4] Vollrath's deposition testimony admits that he read the 1985 OPM section on terminations and that it applied to him.

In 1983 and 1984, Georgia-Pacific's Kalamazoo mill was involved in two wrongful discharge lawsuits filed by former salaried employees. At that time, the attorney for Georgia-Pacific met with Vollrath and another supervisory employee. During the course of this meeting, the Georgia-Pacific's at-will policy was discussed. In addition, in preparing for the litigation Georgia-Pacific's attorney conducted depositions which Vollrath attended. During the course of these depositions questions were asked pertaining to Georgia-Pacific's at-will policy. Finally, during another case preparation meeting, Georgia-Pacific's Kalamazoo Plant Manager went over the at-will policy with the super-

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[4] The 1985 OPM provides in the first paragraph of the section entitled "Termination of Employment — Salaried Employees":

> It is the policy of Georgia-Pacific that the employment and compensation of any employee can be terminated, with or without cause, at any time, at the option of the employee or at the option of the company. Specific procedures to be followed depend upon the circumstances of the termination. Any questions about this policy should be referred to the office of the Vice President–Human Resources.

Further on in the same section, it provides:

> 5. Other Involuntary Terminations. There may be grounds for discharge other than those discussed above. This discussion is not meant to be inclusive or to limit in any way management's freedom to discharge an employee at any time for any reason not prohibited by law.

visory employees and advised Vollrath to go over the policy with his employees to avoid future problems.

In response to the two wrongful discharge lawsuits, Georgia-Pacific's Kalamazoo Assistant Personnel Manager held meetings with the salaried employees at the request of the Plant Manager in order to inform the employees about the at-will policy. At these meetings, the Assistant Personnel Manager specifically told the employees to read the at-will policy and asked if there were any questions. Subsequent to these meetings, certain top level managers, including Vollrath, were again asked to review the at-will policy with their subordinates. Plaintiff's deposition testimony admits that he did meet with his subordinate supervisors to advise them to read the OPM.

STANDARD FOR REVIEW

Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Atlas Concrete Pipe, Inc.* v. *Roger J. Au & Son, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982). There is no material issue of fact for trial unless, by viewing the evidence in favor of the non-moving party, a reasonable jury could return a verdict for that party. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Boddy* v. *Dean*, 821 F.2d 346, 349 (6th Cir. 1987). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249 (citations omitted).

The party moving for summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record which demonstrate the absence of a material issue of fact. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323

(1986); *Potters Medical Center* v. *City Hospital Association*, 800 F.2d 568, 572 (6th Cir. 1986). Once the moving party has met its burden, the non-moving party must go beyond the pleadings and come forward with specific facts to show that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 322-24. If after adequate discovery the party bearing the burden of proof fails to make a showing sufficient to establish an essential element of his claim, summary judgment is appropriate. *Id.*

ANALYSIS

Under Michigan law, contracts of employment for an indefinite period are generally terminable at will. As the Supreme Court of Michigan has stated, "Employers and employees remain free to provide, or not to provide, for job security. Absent a contractual provision for job security, either the employer or the employee may ordinarily terminate an employment contract at any time for any, or no, reason." *Valentine* v. *General American Credit, Inc.*, 420 Mich. 256, 258-59 (1984) (footnote omitted). However, where an employer adopts a policy of discharge for cause only, through either formal or informal actions, an employee has a right to rely on that policy and may not be discharged in violation thereof. *Toussaint* v. *Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 598 (1980). In order to withstand defendant's motion for summary judgment, there must be evidence presented that Georgia-Pacific, through formal or informal actions, adopted a policy of discharge only for cause.

In this case, it is undisputed that Vollrath was not hired pursuant to a written contract. The only written employment policies before the Court neither state nor imply that Georgia-Pacific's employees could be termi-

nated only for cause. On the contrary, Georgia-Pacific's 1983 OPM and 1985 OPM specifically indicate that employees could be terminated "with or without cause, at any time."

Notwithstanding the explicit at-will policy in the OPM, Vollrath argues that he had a legitimate expectation that Georgia-Pacific would not discharge him without just cause. Vollrath points specifically to oral and written statements made by the Plant Manager at various times such as "the best way to keep your job was to do it" as well as the memorandum from the Plant Manager to Vollrath.

After reviewing the evidence presented, the Court concludes that the comments made are not sufficient to create a legitimate expectation of continued employment. Comments regarding continued employment such as chances are "very good" do not affect the company's termination policy. *See Pratt* v. *Brown Machine Co.*, 855 F.2d 1225, 1234 (6th Cir. 1988). The evidence relied upon by Vollrath to support his claim establishes that he only had a subjective expectation of dismissal only for cause. However, "plaintiff's subjective expectation does not create an enforceable contract right." *Dell* v. *Montgomery Ward and Co.*, 811 F.2d 970, 974 (6th Cir. 1987); *Dzierwa* v. *Michigan Oil Co.*, 152 Mich. App 281, 285 (1986).

In addition, the memorandum written from the Plant Manager to Vollrath is not sufficient to create an implied contract of just cause employment in this case. First, the memorandum was written at the time the 1983 OPM was in effect and the at-will policy specifically indicated that it could not be modified except by the Chief Executive Officer of the company. Further, *Toussaint* makes it clear that there can be no legitimate expectation that a particular policy of continued

employment will remain in force where the employer is entitled to unilaterally change such policy. *See Toussaint*, 408 Mich. at 619; *Renny* v. *Port Huron Hospital*, 427 Mich. 415, 428-29 n. 7 (1986). Vollrath's deposition testimony recognizes that the company could unilaterally change its policies and he would be bound by them. Moreover, Vollrath admits that the memorandum made no difference to his decision to move into the maintenance supervisor position. Finally, at the time of Vollrath's discharge the 1985 OPM was in effect and expressly stated Georgia-Pacific's at-will policy. The Court finds that whatever expectations Vollrath might have had based on these representations were unreasonable both in light of the pre-existing 1983 OPM and the subsequently issued 1985 OPM. *See Pratt*, 855 F.2d at 1235.[5] The express language of the OPM negates any expectations Vollrath may have had based on the Plant Manager's assurances. *See Ledl* v. *Quik Pik Food Stores, Inc.*, 133 Mich. App. 583 (1984).

Toussaint preserves an employer's right to "enter into employment contracts terminable at will without assigning cause." *Toussaint*, 408 Mich. at 610. Thus, *Toussaint* claims are denied as a matter of law, "if the employer expressly indicates that there is no guarantee of further employment or that the employment is terminable

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[5] Likewise, the Sixth Circuit in *Dell* v. *Montgomery Ward and Co.*, 811 F.2d 970 (6th Cir. 1987), affirming the district court's grant of summary judgment that the plaintiff could not maintain a *Toussaint* claim for wrongful discharge, stated:

> It is difficult to imagine what more the defendant might have done to make it crystal clear to [the plaintiff], and all [defendant's] employees, that, unless some other arrangement were made directly with the President and Chief Executive Officer or Executive Vice President of Human Resources, [defendant's] employees are employees "at will" who may be discharged with or without cause.

Id. at 974.

at will." *Pratt*, 855 F.2d at 1235 (citations omitted). The Court concludes that the unequivocal language of the handbook reserved the right to discharge employees without cause. The explicit language used by Georgia-Pacific in the handbook "means what it says and is binding upon the parties." *Dell*, 811 F.2d at 974.

The Court recognizes that "a claim for wrongful discharge cannot be maintained where, as here, the employment is on an 'at will' basis." *Haas* v. *Montgomery Ward and Co.*, 812 F.2d 1015, 1016 (6th Cir. 1987) (citations omitted). Thus, this Court must conclude as a matter of law that in light of the express disclaimers negating an employment contract terminable only for just cause, the contract at issue here was an at-will contract which could be terminated with or without cause.[6] Accordingly, Georgia-Pacific's motion for summary judgment must be granted and the instant action dismissed with prejudice.

/s/ BENJAMIN F. GIBSON, U.S. DISTRICT JUDGE

DATED: December 5, 1988

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[6] Since the Court concludes that Georgia-Pacific had reserved the right to terminate its employees at will, it is not necessary for the Court to reach the issue of whether *Toussaint* applies in the workforce reduction situation or whether in this case the discharge was pursuant to a workforce reduction.

(2)

FILED
SEP 28 1990
JOSEPH SPANIOL, JR.
CLERK

CASE NO. 90-369

In The

Supreme Court of the United States

October Term, 1990

HARLEY VOLLRATH,

Petitioner,

v.

GEORGIA PACIFIC CORPORATION,

Respondent.

BRIEF IN OPPOSITION
TO A PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

– AND APPENDIX –

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER, UNDER THE *ERIE* DOCTRINE, A FEDERAL COURT SITTING IN DIVERSITY MAY DISREGARD AN INAPPOSITE INTERMEDIATE APPELLATE COURT DECISION INCONSISTENT WITH OTHER APPELLATE COURT DECISIONS AND WITH PRONOUNCEMENTS OF THE STATE'S HIGHEST COURT IN DETERMINING TO GRANT SUMMARY JUDGMENT IN FAVOR OF AN EMPLOYER ON A STATE-LAW CLAIM OF WRONGFUL TERMINATION?

II.

WHETHER PLAINTIFF-PETITIONER ABANDONED AND/OR FAILED TO DEMONSTRATE A GENUINE ISSUE OF MATERIAL FACT OF WHETHER POSITION ELIMINATION CONSTITUTES REASONABLE CAUSE AS A MATTER OF LAW?

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CASE NO. 90-369

In The

Supreme Court of the United States

October Term, 1990

HARLEY VOLLRATH,

Petitioner,

v.

GEORGIA PACIFIC CORPORATION,

Respondent.

BRIEF IN OPPOSITION
TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

COUNTER-STATEMENT OF THE CASE

A. On May 5, 1987, Plaintiff-Petitioner Harley Vollrath ("Vollrath") filed a one-count Complaint, alleging that Georgia-Pacific Corporation ("Georgia-Pacific" or the "Company") had wrongfully discharged him. Georgia-Pacific timely removed this case to the United States District Court for the Eastern District of Michigan on the basis of diversity of citizenship. [R. 1].

Georgia-Pacific sought summary judgment before the District Court on several alternate and independent grounds.[1] The Company argued, *inter alia*, not only

[1] Georgia-Pacific permitted Vollrath to depose the five persons whose affidavits were submitted in support of its dispositive motion. Those affiants reaffirmed the material contents of their affidavits in their depositions. Deposition of Douglas E. Wagner ("Wagner dep."), taken on July 25, 1988, pp. 5 and 12; Deposition of

(*concluded on page 2*)

that Vollrath's employment was at-will as a matter of law, but also that there was no genuine issue of material fact that the oral statements and written memorandum upon which Vollrath relied were insufficient to demonstrate a legitimate expectation that his employment relationship with Georgia-Pacific could be terminated only for good cause, in light of the express at-will policies in Georgia-Pacific's Operating Procedures Manuals ("OPM's") and Vollrath's deposition admissions that the Company could unilaterally change its employment policy statements, that no one could make a binding agreement with him contrary to Company policy statements, and that the employer's policy statements in the OPM's in effect at the time of his separation applied to him.

In the alternative, the Company also argued that there was no genuine issue of fact that Vollrath's position was eliminated, and that his termination due to position elimination constituted cause as a matter of law.

B. The District Court granted Georgia-Pacific's Motion on December 5, 1988, and dismissed Vollrath's Complaint [R. 50].

In its Memorandum Opinion granting Georgia-Pacific summary judgment, the District Court concluded, as a matter of law, that Vollrath was an at-will employee who could be terminated with or without cause, at any time [R. 49, p. 6]. Relying on Michigan decisional law and Sixth Circuit authority upholding at-will policy statements that are unilaterally imposed and that modify prior policy statements, the District Court

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(continued from page 1)

Robert Fuller ("Fuller dep."), taken on July 19, 1988, p. 12; Deposition of Diane Kievit ("Kievit dep."), taken on July 19, 1988, p. 7; Deposition of Leroy Allen Campbell ("Campbell dep."), taken on July 29, 1988, p. 12; Deposition of Roland Taylor ("Taylor dep."), taken on July 29 1988, p. 42. [The cited excerpts of these deposition transcripts were submitted before the District Court as Exs. 20-24 in support of the Company's dispositive motion, R. 41].

reasoned that neither the alleged oral statements nor a written memorandum by the plant manager at the Kalamazoo facility where Vollrath was employed were sufficient to create a legitimate expectation of continued employment absent cause for discharge, given the express at-will policy statements in the OPM's, and given Vollrath's deposition admissions [R. 49, pp. 5-7]. At most, the District Court reasoned, the comments and memorandum rose to the level of nothing more than a unilateral, subjective expectancy which was not "legitimate" or reasonable under Michigan law in light of the express at-will employer policy statements [R. 49, p. 7].

Finding that no for-cause employment contract existed between Georgia-Pacific and Vollrath, the District Court did not reach the question of whether the elimination of Vollrath's position constituted "reasonable cause" as a matter of law under Michigan law.

C. Although he asks this Court to grant certiorari in part on the ground that there is a genuine issue of material fact as to whether the Company had "reasonable cause" to terminate him, Vollrath abandoned that issue by failing to brief the issue before the Sixth Circuit and/or to cite to *any* record evidence to dispute the economic motivation for the reduction-in-force in which his position was eliminated. Georgia-Pacific submitted record citations demonstrating that Vollrath's position was eliminated in an economically motivated reduction in force so that, under Michigan decisional law, Georgia-Pacific had "reasonable cause" to terminate him as a matter of law. *See* Appendix A.

In his initial brief on appeal, Vollrath first argued that *subsequent* oral modifications could modify express written at-will policy statements under Michigan law. However, when the Michigan Supreme Court thereafter issued decisions in two companion cases, one of which involved the very counsel representing the Petitioner here, Vollrath abruptly shifted his analysis, in a patent

but failed attempt to fall within the pronouncements in *Bullock* v. *Auto Club of Michigan*, 432 Mich. 472, 444 N.W.2d 114 (1989). For the first time in his reply brief on appeal to the Sixth Circuit, Vollrath raised the issue of whether oral statements, now supposedly *prior* to the express at-will policy statements, could give rise to a legitimate expectation of for-cause employment. In its opinion affirming summary judgment in favor of Georgia-Pacific, the Sixth Circuit noted that shift. *See* pp. B-6–B-7 of Appendix B in support of Vollrath's petition for a writ of certiorari.

During a vigorous oral argument before the Sixth Circuit, the panel questioned the parties about the impact on this matter of the *Bullock* case and its companion case, *In re Certified Question: (Bankey* v. *Storer Broadcasting Co.)*, 432 Mich. 438, 443 N.W.2d 112 (1989) (*"Bankey"*). At the conclusion of Vollrath's rebuttal, perhaps because Vollrath had so radically shifted his analysis, the Honorable James L. Ryan (formerly a Justice of the Michigan Supreme Court when that Court issued its decision in *Toussaint* v. *Blue Cross and Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980)) termed Vollrath's case "a lawsuit in search of a theory."

Unpersuaded by Vollrath's efforts, the Sixth Circuit affirmed the District Court's grant of summary judgment in favor of Georgia-Pacific on the grounds that the alleged oral statements and the written memorandum authored by the Kalamazoo facility plant manager when the Company's express at-will policy statement permitted only the Chief Executive Officer of the corporation to modify the at-will policy were insufficient to establish a legitimate expectation of for-cause employment under Michigan law.

D. Vollrath's petition for rehearing *en banc* was denied by order dated May 31, 1990. He now seeks this Court's discretionary review of a state-law case on the

sole theory that the Sixth Circuit has failed to correctly apply substantive Michigan decisional law in dismissing his state-law breach of employment contract case, purportedly in violation of the *Erie* doctrine. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938).

COUNTER-STATEMENT OF FACTS

A. Petitioner's Positions At The Kalamazoo Mill

Georgia-Pacific operates a small paper mill in Kalamazoo, Michigan. In 1981, plaintiff became an Area Maintenance Supervisor at that facility.

Effective January 1, 1983, he was promoted to Plant Maintenance Superintendent, a high-level management position at the mill.

In early January 1986, he was offered and accepted the position of Field Maintenance Representative, a job which required him to travel to other Georgia-Pacific mills and to help with any maintenance problems that he identified [Vollrath dep. 102].

As a Field Maintenance Supervisor, Vollrath was to handle maintenance problems at certain facilities, with major emphasis on the Taylorsville, Indiana mill. Living in Kalamazoo, where he was still based, Vollrath was to assist elsewhere on an as needed basis. Though he remained on the Kalamazoo payroll, his work, salary and expenses at other mills were to be charged to those facilities, but only when he worked there [*See* R. 41, Diane Kievit Aff., Ex. 7, at ¶¶ 1, 8; Norman dep. 72-75].

After a relatively short time, Vollrath developed a poor attitude towards his new position. Vollrath admitted that after he went to Taylorsville he developed the belief that that mill would close fairly soon if things were not fixed [*Id.* at 104, 106]. He voiced a negative view towards the Taylorsville plant and its employees, and indicated that

he no longer wanted to go there [Norman dep. 43-44; Taylor Aff., R. 41, Ex. 1, at ¶ 4].

B. The Kalamazoo Mill's Conceded Economic Difficulties

As Vollrath admitted, 1985 was a bad year for the Kalamazoo mill [Vollrath dep. 186]. By November 1985, the mill was "really hurting" because of a problem with a major piece of equipment for which he had maintenance responsibility [*id.* at 186, 187].

In fact, two other non-union employees were let go in May and December of 1986 for similar reasons as Vollrath was eventually separated; *i.e.*, position elimination. The alternative would have been to keep Vollrath on the Kalamazoo payroll, doing very little at a high salary, at a time Norman was under orders to reduce Kalamazoo's workforce and expenses where possible [Norman dep. 73].

Given these circumstances, and the fact that no openings existed in Kalamazoo, economic considerations required that Vollrath's position be eliminated from the Kalamazoo facility payroll a few months later, which by then had fallen on even harder economic times [Norman dep. 74, 75].

In short, Vollrath's employment was terminated as part of a gradual reduction of the salaried and hourly work force at the Kalamazoo facility, resulting from a shutdown of certain parts of that mill and a general corporate directive to reduce the workforce and costs at that facility where possible [Kievit dep 15-16].

That gradual reduction resulted in a 12% decline (from approximately 400 to 350 persons) in Georgia-Pacific's workforce from the years 1984-1987 [Taylor dep. 39-40].

C. The Company's Express At-Will Policy Statements

It is uncontested that Georgia-Pacific prepares and maintains an Operating Policy Manual ("OPM") which is periodically revised. A copy of the OPM is distributed to certain key salaried supervisory employees, such as Vollrath.

Revisions of the OPM are distributed on either an *ad hoc* basis with respect to a specific subject or incorporated generally in subsequent revised OPM's on a periodic basis.

Although the Company's OPM existed prior to Vollrath's assuming his new management position in 1983, he claimed that he had not read its contents [Vollrath dep. 8-9].

1. THE COMPANY'S 1983 OPERATING POLICY MANUAL

In early January 1983, when Vollrath undertook the position of Plant Maintenance Superintendent at the Kalamazoo mill, the Georgia-Pacific 1983 OPM contained an introductory preface signed by the Chief Executive Officer of the Company, which stated that the OPM would be periodically revised every two years or more, if necessary.

The 1983 OPM also contained a section entitled "Termination of Employment – Salaried Employees." The first paragraph of that Section set forth an express at-will policy statement:

> It is the policy of Georgia-Pacific that the employment and compensation of any employee can be terminated, with or without cause, at any time, at the option of the employee or at the option of the company. No employee or representative of Georgia-Pacific, other than the Chief Executive Office or the Corporate Director – Employee Relations and Administrative Services,

> has any authority to enter into any agreement extending the employment of any employee for any specified period of time, or to make any agreement contrary to the foregoing.
>
> [Ex. 8, p. 49, R. 41.]

At the end of this Section on Termination of Employment, a paragraph entitled "Policy Exceptions" stated that "there will be no exceptions to this policy without the prior written approval of the Chief Executive Officer of the Company." [*Id.*]

2. THE COMPANY'S 1985 OPERATING POLICY MANUAL

In May 1985, Georgia-Pacific again issued a revised OPM. Vollrath admitted that the 1985 OPM was the most recent version of Georgia-Pacific's Operating Policy Manual, and that he believed that there would be subsequent OPM's [*id.* at 315].

Although Vollrath first testified in deposition that he did not recall reading the at-will language of the 1985 OPM, he later admitted that he had read it, after his wife had found his copy of the manual [Vollrath dep. 300-302].

As in the 1983 OPM, the at-will part of the Termination Section of the 1985 OPM was found in the introductory paragraph to this Section and stated:

> It is the policy of Georgia-Pacific that the employment and compensation of any employee can be terminated, with or without cause, at any time, at the option of the employee or at the option of the Company. Specific procedures to be followed depend upon the circumstances of the termination. Any questions about this policy should be referred to the office of the Vice President – Human Resources.
>
> [R. 41, Ex. 9.]

A subsequent paragraph entitled "Other Involuntary Discharges", in the subsection on "Involuntary Termination," stated:

> There may be grounds for discharge other than those discussed above. This *discussion is not meant to be inclusive or to limit in any way management's freedom to discharge an employee at any time for any reason not prohibited by law.*

[Emphasis supplied.]

3. PETITIONER'S ADMISSIONS RELATING TO THE OPM's

Vollrath admitted in deposition that, if he had read the at-will policy in the 1983 OPM, he would have known that any writing or verbal statements inconsistent with this policy were, as he put it, "no good" [Vollrath dep. 136-137].

Vollrath also conceded that the at-will policy in the 1985 OPM, which is virtually identical to the 1983 OPM's at-will provision, stated that his employment could be terminated with or without cause at any time by the Company [*id.* at 330]. He also admitted that he understood that provision to mean that Georgia-Pacific could terminate his employment at any time for any reason [*id.*].

He further believed that the Company's employment policies had changed in the past and would change in the future, and that the language in the 1985 OPM indicated to him that the Company had the right to change any section of the OPM it wanted [*id.* at 315-316]. He also admitted that he could not rely on any employment policy remaining in effect forever and that, when an OPM was periodically revised, a policy statement could be eliminated, modified or remain the same [*id.* at 316].

Finally, Vollrath testified that the employment policy in effect at the time would control until changed, and

he had previously testified he believed he was subject to whatever rules were in effect at the time [*id.* at 242, 316].

Vollrath added that it was his usual practice to familiarize himself with documents he received [*id.* at 314]. He also agreed that a salaried employee at his level should know and follow the Company's employment rules [*id.* at 61-62]. He admitted reading the Termination Section of the 1985 OPM [Ex. 9, R. 41] during his tenure as a Company employee [Vollrath dep. 310-311]. He also admitted reading the OPM's Termination Section to his foremen, pursuant to Plant Manager Norman's orders, because Norman wanted "everybody to go over it" [*id.* at 318]. He stated that he gave his foremen the 1985 OPM, turned to page 20, and told them to read the Termination Section [*id.* at 318-319]. Significantly, prior to having his foremen read this Section, Vollrath had read the entire section, including the at-will paragraph [*id.* at 319, 320, 329].

Vollrath testified that he believed that Georgia-Pacific was bound by whatever was in this Termination Section [*id.* at 332-333]. He also admitted that he did not believe that any person from the Company was allowed to or could deviate from these policy statements in any way, and stated his answer applied to all the policy statements in the Termination Section, including, by necessity, the Company's "at-will" policy [*id.* at 332-334].

Finally, in an important concession, Vollrath also admitted that he believed that no one [including Norman] could do any-thing contrary or inconsistent with the written policies of the 1985 OPM Termination Section, including its at-will policy [*id.* 334].

D. Discussions Relating To The At-Will Policy Statements

In 1983 and 1984, the Kalamazoo mill was involved in two wrongful discharge suits filed by former salaried em-

ployees. The suits claimed that Company had fired the plaintiffs in breach of a for-cause employment contract.

In assisting another counsel in preparing the Company's Answer to a Complaint alleging wrongful discharge brought by another former employee, Vollrath affirmatively acknowledged that employment with Georgia-Pacific was at-will [Wagner dep. 9-10, 13]. In fact, it was Vollrath's assistance that corrected misinformation received by that counsel from in-house counsel to the effect that the Company's employees were other than at-will [Wagner dep. 13]. Vollrath also acquiesced in the assessment that the Company was an at-will employer at the preparation session for his deposition [Wagner dep. 6-7]. At one such preparation session, counsel read the Company's at-will disclaimer to the supervisors present [Fuller dep. 12].

In 1984, Diane Kievit, then the Kalamazoo facility's Assistant Personnel Manager, held three or four meetings with the Kalamazoo salaried employee work force, at the request of Plant Manager Norman, to review the Company's at-will policy. These meetings were prompted by the 1983 wrongful discharge suits. *See* Diane Kievit Aff., Ex. 7, at ¶¶ 1-6, R. 41.

Kievit stated that every salaried employee, including Vollrath, attended at least one of these meetings [Kievit Aff. at ¶ 4, R. 41, Ex. 7]. In preparation for the meeting, she ordered extra copies of the 1983 OPM [*id.* at ¶ 3]. A copy of that OPM, with Vollrath's name handwritten on it, was found in his office. Vollrath conceded that he might have had a 1983 OPM and just thrown it in one of his drawers [Vollrath dep. 303-304].

At these meetings Kievit handed out a copy of the 1983 OPM to everyone who attended and told them to turn to page 49, the page where the at-will policy statement was set forth [Kievit Aff., Ex. 7, at ¶ 6, R. 41]. Kievit instructed the supervisors to read the at-will

disclaimer themselves, and to review the disclaimer with their subordinates [Campbell dep. 31-32].

Vollrath was present at a meeting sometime in 1984, as was his co-worker Robert Fuller, when the Company's at-will disclaimer in the 1983 OPM was distributed to and read by all employees present and was explained [Fuller dep. 13-15]. Mr. Fuller testified that he had personally observed Vollrath at that meeting [Fuller dep. 16].

At those meetings, the supervisors were instructed, not only to read the at-will disclaimer themselves, but also to review the disclaimer with their subordinates [Campbell dep. 31-32].

Subsequent to those meetings, Plant Manager Norman met with certain top-level managers, including Petitioner. He gave them a copy of the 1983 OPM and told them to review its at-will policy with their supervisory subordinates [Kievit Aff. at ¶ 7, R. 41, Ex. 7; Campbell Aff. at ¶ 3, R. 41, Ex. 2; and Norman dep. 57-59, 81, 90, 92].

Vollrath admitted that he held meetings with his subordinate supervisors to discuss Georgia-Pacific's at-will policy statements because Norman ordered it [Vollrath dep. 30], and he believed these meetings were prompted by the earlier wrongful discharge suits [*id.*]; however, he believed that he used the *1985* OPM in these meetings, a distinction without a difference.

Vollrath met in his office with his supervisors and went over the Termination of Salaried Employees section of the OPM then in effect [*id.* at 29]. Vollrath admitted that Norman told him that all employees must read the Section on Employment Termination, and that he told his employees that Norman wanted him to have them read and understand Georgia-Pacific's policy regarding discharge and the subject of job security [*id.* at 31]. He also admitted reading the at-will provision in the 1985 OPM [*id.* at 320].

E. Vollrath's Admissions About The Bases For His Contract Claim

The alleged oral statements upon which Vollrath relied were casual statements among friends, over beers, after work. Vollrath conceded in deposition that, if he had read Georgia-Pacific's at-will policy statements, he would have known that the oral statements had no effect [Vollrath dep. 136-137]. Norman also testified that, although he may have said "the best way to keep your job was to do it," he never said nor meant that if an employee did his job it was guaranteed that the Company would not discharge the employee [Norman dep. 54-55].

Vollrath also points to an undated and unauthorized memorandum from his longtime friend Norman as a basis for his breach of employment contract claim. The memorandum stated:

> As mutually agreed upon, in the event that problems arise in Harley's performance as Maintenance Superintendent, he will be given the option to return to Area Supervisor.

In deposition, however, Vollrath admitted that the memorandum was silent as to any termination criteria or duration of employment with the Company [Vollrath dep. 119]. He also admitted that, if he had read the Georgia-Pacific at-will policy statement, he would have known that the memorandum was "no good" [Vollrath dep. 136-137]. The memorandum was written in or around March of 1984, when the 1983 OPM was in effect, which expressly stated that the Company's at-will policy could not be modified except in writing by the Chief Executive Officer of the Company [Vollrath dep. 111]. Both Vollrath and Norman knew that the latter did not have the authority to write the memorandum, which Vollrath conceded was written out of personal friendship and in case anything happened to

Norman, not to Vollrath [Vollrath dep. 112-113, 117; Norman dep. 96].

ARGUMENT

I.

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DID NOT VIOLATE THE *ERIE* DOCTRINE IN THE CASE AT BAR.

In support of the sole basis for his petition for a writ of certiorari, Vollrath relies primarily upon a single decision by one panel of Michigan's intermediate appellate court, *Dalton* v. *Herbruck Egg Sales Corp.*, 164 Mich. App. 543, 417 N.W.2d 496 (1987), in support of his claim that the Sixth Circuit violated the *Erie* doctrine by disregarding Michigan decisional law relating to employment contracts. Vollrath contends, incorrectly, that the Sixth Circuit "could not point to any other decision of the Michigan Court of Appeals or the Michigan Supreme Court that indicated that *Dalton* was wrongly decided" [Petition, pp. 9-10].

While it is well-settled that, under the *Erie* doctrine, a federal court sitting in diversity applies state substantive law to the dispute at bar, it is equally well-settled that a federal court may disregard an intermediate appellate court's decision where it is convinced by other persuasive data that the state's highest court would decide otherwise, where the decision is in conflict with other decisions by courts of the same level, and/or where a decision of the state's highest court has been rendered in an analogous or related area and has laid down broad principles or theories with which the lower court's decision is inconsistent. *Fidelity Union Trust Co.* v. *Field*, 311 U.S. 169, 61 S. Ct. 176, 85 L. Ed. 109 (1940); *Commissioner* v. *Bosch's Estate*, 387 U.S. 456, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967). This Court has observed that, even though the highest state court

is the final authority on state law, it is still the duty of the federal courts, where state law supplies the rule of decision, to ascertain and to apply that law; thus, the federal courts need not blindly follow the decision of an intermediate state court where it is convinced by other persuasive data that the state's highest court would decide otherwise. *Fidelity Union Trust Co.*

Vollrath misstates the Sixth Circuit's position in *Pratt* v. *Brown Machine Co.*, 855 F.2d 1225 (6th Cir. 1988), which the *Vollrath* panel cited with approval, by asserting that the *Pratt* decision merely referenced another Sixth Circuit case, *i.e.*, *Reid* v. *Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986), rather than any Michigan decisional law, to justify its disregard for the *Dalton*[2] case. The *Pratt* panel expressly adopted the analysis in *Reid*, which explained that express at-will policy statements, such as the statements there and at bar, had been enforced by the intermediate appellate courts in Michigan as to both prospective and existing employees in *Eliel* v.

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[2] The dubious reasoning of *Dalton* was not followed by the Sixth Circuit in *Pratt*:

> The dissent takes us to task for refusing to follow the decision of the Michigan Court of Appeals in *Dalton* v. *Herbruck Egg Sales Corp.*, 164 Mich. App. 543, 417 N.W.2d 496 (1987). While it is true that "[t]he law of Michigan is controlled by a decision of the Michigan Court of Appeals until the Michigan Supreme Court or another panel of the Michigan Court of Appeals rules otherwise," *Wieczorek* v. *Volkswagenwerk, A.G.*, 731 F.2d 309, 310 (6th Cir. 1984) (citations omitted), it is equally true that we need not blindly follow such precedent where we are "convinced by other persuasive data that the highest court of the state would decide otherwise.", *Kochins* v. *Linden-Alimak Inc.*, 799 F.2d 1128, 1140 (6th Cir. 1986) (quoting *Clutter* v. *Johns-Manville Sales Corp.*, 646 F.2d 1151, 1153 (6th Cir. 1981). We believe *Dalton* is inconsistent with the teachings of *Toussaint* and its progeny, and thus subscribe to the better reasoned analysis of Judge Lively in *Reid* v. *Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986).

See also Nora v. *Carrier*, 861 F.2d 457, 461 (6th Cir. 1988).

Sears, Roebuck & Co., 150 Mich. App. 137, 387 N.W.2d 842 (1986), and *Ledl* v. *Quik Pik Food Stores, Inc.*, 133 Mich. App. 583, 349 N.W.2d 529 (1984), discussed, *infra*.

The sole intermediate appellate case upon which Vollrath relies for the proposition that the Sixth Circuit violated the *Erie* doctrine in affirming summary judgment is also inapposite, as the Sixth Circuit properly pointed out in its opinion below. The holding in *Dalton* relates only to policy manuals containing purportedly contradictory policy statements and does not involve extrinsic oral statements. Nor are the express at-will policy statements in *Dalton* and in this case comparable: the express at-will policy statement at issue here prohibits modification by anyone other than the Chief Executive Officer of the Company.

Dalton relies on the non-evident premise that the mere existence of a progressive disciplinary system creates a for-cause termination procedure. This leap of faith gives non-union employees more protection that union employees because it fails to distinguish between procedural rights and substantive policies. If *Dalton* were the law, no union contract would bother to spell out that discharge can only be "for cause" where a contract also has a progressive disciplinary procedure.

Particularly where the intermediate appellate case cited by Vollrath is inapposite and illogical, and where it is in conflict with other decisions of the same court and with the state's highest court, the Sixth Circuit could well be persuaded that it should not be followed, pursuant to *Erie* and its progeny.

II.

THE SIXTH CIRCUIT PROPERLY AFFIRMED SUMMARY JUDGMENT ON THE BASIS THAT VOLLRATH WAS AN AT-WILL EMPLOYEE.

Under this Court's recent decisions, the moving party has a right to summary judgment where it has demon-

strated that a plaintiff's claims have no factual basis. *Celotex Corporation* v. *Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

Under this precedent, and relying upon Michigan decisional law, the Sixth Circuit properly affirmed the District Court's grant of summary judgment in favor of the Company on the basis that, given Vollrath's deposition admissions and Georgia-Pacific's express at-will policy statements, Vollrath was an at-will employee.

1. In *Toussaint* v. *Blue Cross and Blue Shield of Michigan*, the Michigan Supreme Court reaffirmed the general rule that "in the absence of distinguishing features or provisions or a consideration in addition to the services to be rendered, . . . contracts [for permanent employment] are indefinite hirings, terminable at the will of either party." 408 Mich. at 596, quoting *Lynas* v. *Maxwell Farms*, 279 Mich. 684, 687, 273 N.W.2d 315 (1937). Accordingly, where employment is at will, even an arbitrary or capricious discharge will not give rise to liability on the part of the employer. *See, e.g., Herndon* v. *Consumers Power Co.*, 72 Mich. App. 349, 249 N.W.2d 419 (1976).

Toussaint did not alter the general rule that indefinite hirings are terminable at will. It also preserved the presumption that the parties intended to obligate themselves to an at-will relationship. 408 Mich. at 600. That presumption has been reaffirmed in a number of post-*Toussaint* cases. *Reid* v. *Sears Roebuck & Co., supra*; *Wickes* v. *Olympic Airways*, 745 F.2d 363 at 369 (6th Cir. 1984); *Kay* v. *United Technologies*, 757 F.2d 100 (6th Cir. 1983); *Valentine* v. *General American Credit, Inc.*, 420 Mich. 256, 362 N.W.2d 628 (1984); *Suchodolski* v. *Michigan Con. Gas Co.*, 412 Mich. 692,

316 N.W.2d 710 (1982); *Ledl* v. *Quik Pik Food Stores, Inc., supra*; *Schwartz* v. *Michigan Sugar Co.*, 106 Mich. App. 471, 308 N.W.2d 459 (1981), *lv. den.*, 414 Mich. 870 (1982).

In *Valentine* v. *General American Credit, Inc.*, the Michigan Supreme Court reaffirmed an employer's right to remain an at-will employer:

> Employers and employees remain free to provide, or not to provide, for job security. Absent a contractual provision for job security, either the employer or the employee may ordinarily terminate an employment contract at any time for any, or no, reason.

420 Mich. at 258-59 (footnote omitted).

Under the *Toussaint* doctrine, the presumed at-will employment relationship can be modified only where the employer adopts a policy that clearly and deliberately indicates that the employment relationship will only be terminated for cause:

> [E]mployers are most assuredly free to enter into employment contracts terminable at will without assigning cause. We hold only that an employer's express agreement to terminate only for cause, or statements of company policy and procedure to that effect, can give rise to rights enforceable in contract.

408 Mich. at 610.

2. Only a *"legitimate expectation"* based on objective criteria, and not an employee's unilateral and subjective expectation of discharge only for cause, is sufficient to state a *Toussaint* cause of action. *Toussaint, supra*, at 598, 615, 617, 619; *Schwartz* v. *Michigan Sugar Co., supra*; *Henry* v. *Hosp. and Health Services Credit Union*, 164 Mich. App. 90, 416 N.W.2d 338 (1987).

No such legitimate expectation can exist where, as here, an employer has disclaimed assurances of job security and/or has expressly stated that its relationship with its employees is terminable at the will of either party. *Toussaint*, 408 Mich. at 612, n. 24.

The *Toussaint* Court further noted that apprising employees that policies are subject to unilateral change precludes "legitimate expectations" that policies will remain in effect:

> Employers can make known to their employees that personnel policies are subject to unilateral changes by the employer. Employees would then have no legitimate expectation that any particular policy would continue to remain in force.

Id. at 619.

3. The Company's OPM's contained an express at-will policy statement, which Vollrath admitted reading. Accordingly, as the Sixth Circuit found, Vollrath could not have a reasonable or legitimate expectation that his employment was other than terminable at the will of either party. *See, e.g., Dell* v. *Montgomery Ward & Co.*, 811 F.2d 970 (6th Cir. 1987); *Haas* v. *Montgomery Ward & Co.*, 812 F.2d 1015 (6th Cir. 1987); *Engquist* v. *Livingston County*, 139 Mich. App. 280, 284, 361 N.W.2d 794 (1984).

As Georgia-Pacific argued below, and as the Sixth Circuit has recognized in *Reid* and *Pratt*, the Michigan Court of Appeals has ruled that an express at-will policy statement in an employee handbooks or other documents provided to employees, such as the express at-will policy statements in the Company OPM's, precludes any legitimate expectation of a for-cause contract for both prospective and existing employees. In *Eliel* v. *Sears, Roebuck & Co., supra*, the Court of Appeals enforced a similar express at-will policy statement in an employment application and permitted

summary judgment in favor of the employer, even where, as here, plaintiff Eliel claimed that certain oral statements made to him after he signed the application created an oral cause contract. Because the Sears policy statement apprised employees that no one except the president or vice president of the company could alter an at-will employment relationship, the Court declined to permit the oral statements to negate the written policy statements. Similarly, in *Ledl* v. *Quik Pik Food Stores, Inc., supra,* the Michigan Court of Appeals enforced a written at-will policy statement which was unilaterally imposed upon an employee, upon reasonable notice to all affected employees, several years after she was hired. Recently, in *Pepperman* v. *Automobile Club of Michigan Ins. Group,* 181 Mich. App. 519, 450 N.W.2d 66 (1989), the Michigan Court of Appeals again refused to permit alleged oral statements to modify a written at-will policy statement which by its terms prohibited any modifications unless in writing by the company president's authorized representative. Again, in *Grow* v. *General Products, Inc.,* 184 Mich. App. 379, 457 N.W.2d 167 (1990), the Michigan Court of Appeals affirmed summary judgment for the dual reasons that the oral statements alleged by plaintiff Grow were insufficient to give rise to a legitimate expectation of a for-cause termination contract, and that distribution of the company's express at-will policy statement to all employees, with review of the statement at staff meetings, as here, was sufficient "reasonable notice" under *Bankey* to permit enforcement of the at-will policy.

The two cases upon which Vollrath heavily relies in his petition for a writ of certiorari are inapposite. Not only is the holding in *Dalton* v. *Herbruck Egg Sales, Inc., supra,* limited to policy manuals which appear internally inconsistent, but also there had been no express at-will policy statement issued by the employer in *Langeland* v. *Bronson Methodist Hospital,* 178 Mich. App. 612, 444 N.W. 2d 146 (1989).

Given these intermediate appellate decisions, which conflict with *Dalton*, the Sixth Circuit could well conclude that Michigan law permitted enforcement of Georgia-Pacific's express at-will policy statements.

4. The disclaimers in the 1983 and 1985 OPM's notwithstanding, Vollrath's claim that he has an implied contract for just cause seems to rest on a number of vague, casual statements made among friends, over beers, after work. Apparently, on several occasions, Norman said words to the effect that "the best way to keep your job was to do it" [Norman dep. 54]. Norman testified that he never said nor meant that if an employee did his job it was guaranteed Georgia-Pacific would not discharge him [*id.* at 55].

Initially, it is significant that such vague statements under informal circumstances, as the District Court and the Sixth Circuit both concluded, do not create a contract or agreement terminable only for cause. *See Carpenter* v. *American Excelsior Co.*, 650 F. Supp. 933 at n. 6 (E.D. Mich. 1987), in which District Court Judge Newblatt labelled such statements nothing more than language of hope, but not of promise.

In any event, even if such statements were deemed "language of promise," they could not give rise to a "legitimate" expectation of "for-cause" employment.

An employee cannot obtain an advantage by claiming that he did not read or understand an employee handbook's terms. *Reid* v. *Sears Roebuck & Co.*, 790 F.2d at 461; *Carpenter* v. *American Excelsior Co.*, *supra*. Here, there is no genuine issue of material fact that Vollrath received and reviewed the express at-will policy statements at issue, while assisting in the defense of two wrongful discharge lawsuits and at several staff meetings [Wagner dep. 6-7, 9-10, 12-13; Fuller dep. 11-16; Kievit dep. 24; Campbell dep. 31-32]. It is also significant, as the Sixth Circuit noted, that plaintiff admitted

reading the at-will disclaimer in the 1985 OPM [Vollrath dep. 320].

Given his deposition admissions, as the Sixth Circuit properly found, Vollrath could not have had a legitimate expectation of job security. *Longley* v. *Blue Cross & Blue Shield of Michigan*, 136 Mich. App. 336, 340-41, 356 N.W.2d 20 (1984) (plaintiff's *Toussaint* claim dismissed because she lacked subjective belief that she was terminable for cause even though handbook said good cause, since subjective expectancy is required). *See also, Dell* v. *Montgomery Ward & Co., supra*; *Haas* v. *Montgomery Ward & Co., supra*; *Edwards* v. *Whirlpool Corp.*, 678 F. Supp. 1284 (W.D. Mich. 1987).

5. Vollrath also refers to an unauthorized memo which does not even mention the subject of job security. However, that memo did not, by Vollrath's own admission, have any effect in light of the at-will policy in Georgia-Pacific's 1983 and 1985 OPM's [Vollrath dep. 136-137].

Of significance is Vollrath's admission that the memo says nothing about the criteria the Company would use in deciding whether or not to terminate his employment, or how long he would continue to work with the Company [*id.* at 119]. As such, even absent the Company's clear at-will policy statement, the memo cannot serve as the objective basis upon which a *Toussaint* claim is founded. *See Skurski* v. *Detroit Strip Div., Cyclops Corp.*, No. 87 CV 73127 DT (E.D. Mich. June 24, 1988) [Ex. 26, R. 41].

Moreover, Vollrath admitted that, if he had read the Company's at-will policy, he would have known that Norman's letter was against policy and was "no good" [Vollrath dep. 136-137]. Finally, he conceded that no one (including Norman) could do anything inconsistent with the OPM's termination section [Vollrath dep. 330-334]. That admission alone demonstrates that, even if the oral and written statements alleged were true and

applicable, he could have no legitimate expectation based upon those statements to a just-cause contract. *Longley* v. *Blue Cross and Blue Shield of Michigan, supra*; *Schwartz* v. *Michigan Sugar Co., supra.*

Vollrath also believed the memo was not operative if, as in this case, he was in a different job other than that of Plant Maintenance Superintendent [*id.* at 116]. This belief is consistent with Michigan law which establishes that Vollrath's later agreement to accept the FMR position superseded and rescinded any "promise" that Norman may have made in his memo. *See, e.g., Culver* v. *Castro,* 126 Mich. App. 824, 338 N.W.2d 232 (1983).

Most significantly, and dispositive in the Sixth Circuit's view, Norman's memo was written in about March 1984 [Vollrath dep. 111], when the 1983 OPM was in effect, which contained an express at-will policy statement that by its terms could not be modified except in writing by the CEO of the Company.

6. In any event, both the memo and the alleged oral statements, which Vollrath alleges were made by Norman, were not made within the scope of his authority. As such, as Georgia-Pacific argued below, they cannot form the basis by which Vollrath can withstand summary judgment.

If the statements were offered to prove the operative facts of the employment contract, then they could not be admitted as a party admission in order to withstand summary judgment. F.R.E. 801(d)(2)(D); *Hill* v. *Spiegel, Inc.*, 708 F.2d 233 (6th Cir. 1983); *Mitroff* v. *Xomox Corp.*, 797 F.2d 271 (6th Cir. 1986); *N.L.R.B.* v. *Sherwood Trucking Div.*, 775 F.2d 744 (6th Cir. 1985). Such statements would be admissible only for the limited purpose of proving that such a statement was made, but *not* for the truth of the matter asserted within the statement. *Restatement, Second, of Agency,* §§ 284 and 286. Unless there is *actual* authority to make statements offered as admissions against a principal, they

are inadmissible, and whether or nor there is apparent authority is immaterial. *Restatement, Second, of Agency,* § 286.

7. Vollrath's contention that the Sixth Circuit misapplied Michigan law in granting Georgia-Pacific summary judgment is inconsistent with two cases which were handed down after he filed his initial brief on appeal.

In *Bankey, supra,* the Michigan Supreme Court permitted employers to alter even a for-cause job security term by a subsequently announced at-will policy, even where the employer had not expressly reserved a right to unilaterally amend its policies, as long as the affected employees received reasonable notice of newly adopted and uniformly applied policy. Given the numerous meetings held by the Company to apprise employees of its at-will employment policy, "[i]t is difficult to imagine what more the [Company] might have done to make it crystal clear to [Vollrath], and all [Georgia-Pacific] employees, that, unless some other arrangement were made directly with the [persons mentioned in the disclaimers], [Georgia-Pacific] employees are employees "at will" who may be discharged with or without cause." *Dell* v. *Montgomery Ward & Co., Inc.,* 811 F.2d at 974.

In *Bullock, supra,* the Michigan Supreme Court declined to affirm summary judgment on a thin record where the alleged *Toussaint*-type oral promise recited in the Complaint (that plaintiff would have a "lifetime job" as long as he did not steal) was not rebutted by affidavit testimony that a policy manual was often revised. There is no suggestion in *Bullock* that the AAA manual there contained an express at-will policy statement containing merger and no-modification clauses, as here. In fact, the *Bullock* Court pointedly noted that the record had not been sufficiently developed.

In contrast, here, the record evidence shows that the oral statements and memo at issue, whether made before or after the 1983 and 1985 OPM's, cannot render the express at-will policy statements ambiguous since Vollrath had reviewed and read the policy statements and admitted that Norman had no authority to alter Company policy. Vollrath also acknowledged that Georgia-Pacific has had a long-standing practice of unilaterally modifying its personnel policies [Vollrath dep. 315-316]. He also testified that no one could rely on any part of any policy remaining in effect forever and it could be modified, eliminated or remain the same [*id.* at 316]. Finally, Vollrath admitted that whatever policy in effect at the time applies until changed [*id.*]. This testimony obviates any legitimate expectation by Vollrath that any "for-cause" policy would continue and remain the same. *See Bankey, supra; Schwartz, supra; Engquist* v. *Livingston County, supra.*

8. Georgia-Pacific also argued below that any alleged modifications to an express at-will contract would be void under the Michigan Statute of Frauds.[3]

Here, Vollrath has never alleged that the oral "modifications" were made pre-hire, were later confirmed in writing "signed by the party against whom it is sought

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[3] M.C.L.A § 566.1; M.S.A. § 26.978(1) provides that:

> An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration: Provided, that the agreement changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest shall not be valid or binding unless it shall be in writing and signed by the party against whom it is sought to enforce the change, modification, or discharge.

M.C.L.A § 566.1 has been held applicable to employment relationships; *Small* v. *Chemlawn*, 584 F. Supp. 690 (W.D. Mich. 1984), *aff'd* 765 F.2d 146 (6th Cir. 1984); *Hayes Albion Corp.* v. *Kuberski*, 108 Mich. App. 642, 650, 311 N.W.2d 122 (1981), *aff'd in part, rev'd in part*, 421 Mich. 170 (1984).

to enforce the change," or that any consideration was given in exchange for these alleged oral modifications. Thus, under M.C.L.A. § 566.1, these statements, which are not supported by consideration and which are not in writing, are not enforceable.

Nor can the memo written to him by Norman be enforced as a modification of the OPM's. Vollrath was aware that Norman did not have the authority to write the memo [Vollrath dep. 96]. Such an unauthorized act by an agent cannot bind a principal where the promisee knows that the agent has exceeded the scope of his authority. *Restatement 2d, Agency,* § 166. Since the memorandum is thus also not signed by the party against whom enforcement is sought, M.C.L.A § 566.1 invalidates any claim that Vollrath's at-will employment relationship was modified by Norman's memorandum.

III.

GIVEN VOLLRATH'S WAIVER OF THE ISSUE AND HIS ADMISSIONS, GEORGIA-PACIFIC HAD CAUSE TO DISCHARGE HIM.

Although he failed to brief the issue of whether position elimination constituted cause as a matter of law before the Sixth Circuit, and therefore abandoned the issue on appeal, Vollrath raises the issue now as he seeks review by this Court.

Apart from plaintiff's conclusory allegations, there is no record evidence to raise a genuine issue of material fact that Vollrath's position was eliminated as the work force at the Kalamazoo facility declined approximately 12% from 1984 to 1987, that plaintiff was not replaced, and that a cost savings was effected by the position elimination [Taylor dep. 39-40; Kievit dep. 12-13, 15-17, 23].

1. It is well-established that termination of an employee for reasons of economic necessity does not

constitute grounds for a wrongful discharge claim. *Boynton* v. *TRW, Inc.*, 858 F.2d 1178 (6th Cir. 1988); *Friske* v. *Jaskinski Builders, Inc., supra* like effect: *Bhogaonker* v. *Metropolitan Hospital*, 164 Mich. App. 563, 565-566, 417 N.W.2d 501 (1987); *Nixon* v. *Celotex Corp.*, 693 F. Supp. 547 (W.D. Mich. 1988) and cases cited therein.

2. Under Michigan law, where a plaintiff, as here, fails to dispute the economic reasons for the elimination of his position, then as a matter of law, the employer has reasonable cause for discharging the employee. *See, Boynton* v. *TRW, supra*, and the cases cited therein.

In *Friske* v. *Jaskinski Builders, Inc., supra*, the Michigan Court of Appeals concluded that to hold otherwise would impose an unworkable burden upon the state's employers:

> Case law indicates that termination of the employment of an otherwise competent employee due to an economically motivated business closing is not grounds for a wrongful discharge claim. *See, e.g., Bouwman* v *Chrysler Corp*, 114 Mich App 670, 681-682; 319 NW2d 621 (1982), *lv den'd*, 417 Mich 989 (1983); *Sahadi* v *Reynolds Chemical*, 636 F.2d 1116, 1118 (6th Cir. 1980); *FS Royster Guano Co.* v *Hall*, 48 F.2d 533, 535 (4th Cir. 1934). We find that these cases are analogous to the instant case and support a holding that, as a matter of law, Plaintiff's discharge for economic reasons, as determined by and within the complete discretion of the board of directors of defendant corporation, constitutes termination for sufficient cause. To hold otherwise would impose an unworkable economic burden upon employers to stay in business to the point of bankruptcy in order to satisfy employment contracts and related agree-

ments terminable only for good and sufficient cause.

Vollrath asserts before this Court for the first time that the alleged offer of a position in Taylorsville "casts doubt" upon the Company's contention that he was terminated during a reduction in the work force at the Kalamazoo facility. However, the testimony upon which Vollrath now relies does not establish any genuine issue of material fact:

> Q. . . . I mean, but in terms of the elimination of the position, was it eliminated because Taylorsville didn't want to pay for Harley any longer?
>
> A. No.
>
> [Petition, p. 5, n. 2.]

Such testimony is completely inconclusive about the economic considerations at the *Kalamazoo* mill where Vollrath was based, and is hardly sufficient to raise any genuine issue of material fact that Vollrath's position was eliminated from the Kalamazoo payroll for economic reasons, particularly where Vollrath himself refused to return to the Taylorsville plant.

3. Vollrath also suggests that the issue of whether position elimination constitutes cause for discharge is presently pending before the Michigan Supreme Court in *McCart* v. *J. Walter Thompson, U.S.A., Inc.*, 181 Mich. App. 611, 450 N.W.2d 10 (1989), *lv. granted*, 434 Mich. 909 (1990). However, *McCart* is inapposite. There, plaintiff alleged that his selection for inclusion in a layoff resulted from the company president's personal dislike of him, rather than from economic motivation. Vollrath has never made any such allegation of pretext, nor has he adduced any record evidence of any reason other than an economic reason for the elimination of his position at the Kalamazoo mill.

CONCLUSION

For any of the foregoing reasons, Respondent Georgia-Pacific Corporation respectfully requests this Court to deny Vollrath's petition for a writ of certiorari.

Respectfully submitted,

MILLER, CANFIELD,
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Dated: September 28, 1990

APPENDIX TO BRIEF IN OPPOSITION

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APPENDIX A

CITATIONS TO APPENDIX REQUESTED BY JUDGE KENNEDY TO BE GIVEN TO CLERK

On the issue of whether plaintiff conceded the issue of economically motivated reduction in force so that there is cause as a matter of law:

(A) There was an on-going reduction in workforce of 12% at Kalamazoo facility.

(Taylor dep. 39-40)
R. 46, Ex. 24 at *pp. 1275-1276 of Appendix*

(B) There was a general corporate directive to reduce workforce.

(Kievit Aff, ¶ 8)
R. 41, Ex. 7 at *p. 1014 of Appendix*

(C) Plaintiff's job was eliminated as part of reduction in force due to the directive and shutdown of De-Ink plant.

(Kievit Aff, ¶ 8)
R. 41, Ex. 7 at *p. 1014 of Appendix;*

(Pl. Tr. 213)
R. 41. at *p. 1134 of Appendix*

(D) Plaintiff admits 1985 was a bad year for Kalamazoo plant.

(Pl. Tr. 186-187)
R. 41 at *pp. 1129-1130 of Appendix*

(E) 1986 brought even harder economic times to plant.

(Norman dep. 74-75)
R. 41 at *pp. 1192-1193 of Appendix*

(F) Two other salaried employees were also RIF'd in the 6-month timeframe.

(Kievit dep.)
R. 46, Ex. 22, at *pp. 1257-1258 of Appendix*

(G) Plaintiff was not replaced.

(Kievit dep.)
R. 46, Ex. 22, at *p. 1259 of Appendix*

(H) Plaintiff accepted a $12,000 severance package for which he admitted he was eligible only if his job were eliminated.

(Pl. Tr. 214)
R. 41, Ex. 14, at *p. 1135 of Appendix*

See: 1983 OPM
R. 41 Ex. 9, at *p. 1033 of Appendix*

See: 1985 OPM
R. 41 Ex. 8, at *p. 1026 of Appendix*

(I) For first time on appeal, plaintiff cites pp. 61-62 of Norman's deposition testimony, still without briefing the issue, and claims that Norman stated economics did not motivate Plaintiff separation.

See, in contrast, Norman's deposition testimony at *pp. 1190-1191 of Appendix*, clarifying confusing passage cited by Plaintiff.

(*not* called to court's attention below or filed by Plaintiff (who noticed Norman's deposition) as part of record).

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